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RECORD, CASE No. 13,385.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM ~~No., 285~~ 25

CHARLES FOSTER, APPELLANT,

vs.

THE MANSFIELD, COLDWATER & LAKE MICHIGAN RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED OCTOBER 18, 1888.

RECORD, CASE No. 13,385.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 266.

CHARLES FOSTER, APPELLANT,

vs.

THE MANSFIELD, COLDWATER & LAKE MICHIGAN RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

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a Pleas in the circuit court of the United States for the northern district of Ohio, held in the United States court-rooms, in the city of Cleveland, in the district aforesaid, before the judges thereof, on the 24th day of September, in the April term of said court, in the year of *your* Lord one thousand eight hundred and eighty-eight, and of our Independence the one hundred and thirteenth year.

AUGUSTUS J. RICKS, *Clerk.*

1 In the Circuit Court of the United States, Northern Dist. of Ohio, Eastern Division.

CHARLES FOSTER, for Himself and Others, Complainant,
vs.
THE MANSFIELD, COLDWATER & LAKE MICHIGAN Railroad Co., The Northwestern Ohio Railway Company, The Pennsylvania Company, The Pennsylvania Railroad Company, George W. Cass, Reuben F. Smith, J. Twing Brooks, George W. Layng, Frank Janes, F—— A. Gorham, Henry C. Hedges, and Stephen B. Sturges, Defendants. } In Equity.

To the Honorable Judges of the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, in Chancery sitting:

Charles Foster, who is a resident of the village of Fostoria, in the State of Ohio, and a citizen of said State, for the benefit of himself, and all other stock-holders of the defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, who are very numerous, so as to make it impracticable to bring them all before the Court, brings this his bill of complaint against the said, The Mansfield, Coldwater and Lake Michigan Railroad Company, a corporation duly created and organized under the laws of the States of Ohio and Michigan, for the construction of a railroad located partly within the said Northern District of Ohio, Eastern Division, and partly in the Western Division of said District, and in the Eastern and Western Districts of the State of Michigan, and being a citizen of
2 the State of Ohio. The Northwestern Ohio Railway Company, a corporation created and organized under the laws of the State of Ohio, and owning, and by lessee operating, the railroad in this bill hereinafter more fully described, and a citizen of said State of Ohio; The Pennsylvania Company, a corporation created and organized under the laws of the State of Pennsylvania, and a citizen of said State; The Pennsylvania Railroad Company, a corporation created and organized under the laws of the State of Pennsylvania, and a citizen of said State; George W. Cass, a resident of the city of New York in the State of New York, and a citizen of said state; Reuben F. Smith, a resident of the city of Cleveland, in the State of Ohio, and a citizen of said State; J. Twing Brooks, a resi-

dent of the town of Salem, in the State of Ohio, and a citizen of said State; George W. Layng, a resident of the city of Toledo in the State of Ohio, and a citizen of said State; Frank Janes, a resident of the city of Toledo in the State of Ohio, and a citizen of said State; F—. A. Gorham, whose full first name is unknown to complainant, a resident of the city of Grand Rapids in the State of Michigan, and a citizen of said State; Henry C. Hedges, a resident of the city of Mansfield, in the State of Ohio, and a citizen of said State, and Stephen B. Sturges, a resident of the city of Brooklyn in the State of New York, and a citizen of that State.

And thereupon your orator complains and says, that prior to the commencement of this action, to wit: On the 13th day of July, 1887, your orator in writing addressed to each of the Directors and the chief officers of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, requested said defendant railroad company to commence the suit brought by your orator herein, for the reasons in said writing set forth, a copy of which writing is hereto attached, marked Exhibit "A," and made part of this bill of complaint, and notified said defendant company and its directors that unless such an action was brought by the said company, its Directors or Stockholders, within a reasonable time, your orator would himself bring this action for the benefit of himself and the other stock-holders of the said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company; that the said, The
3 Mansfield, Coldwater and Lake Michigan Railroad Company, its directors and stock-holders neglected and refused, and still refuse to bring the said action, wherefore your orator brings this his said bill as aforesaid, and says:

That at the time of the various transactions in this bill of complaint hereinafter set forth, and complained of, he was and ever since has been the owner and holder of 258 shares of the capital stock of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, of the par value of $12,900, and this suit is not a collusive one, on the part of your orator, to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

And your orator further says:

That until within a few months prior to the filing of this bill, he and those whom he represents were entirely ignorant of each and all of the fraudulent proceedings hereinafter set forth, and that this bill of complaint was filed in this court as soon after the acts of fraud, hereinafter set forth, came to his knowledge, as he could satisfy himself of the truth thereof.

Your orator further says, that on or about the first day of June, 1871, said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, was duly and legally created, incorporated and organized as a railroad corporation of the States of Ohio, and Michigan for the purpose of locating, constructing and operating a line of railroad from the city of Mansfield in Richland county, Ohio, through the counties of Richland, Crawford, Seneca, Hancock, Wood, Henry, Fulton and Williams in the State of Ohio, and through the

counties of Hillsdale, Branch, Calhoun, Barry, Kalamazoo and Allegan in the State of Michigan, to the town of Allegan in said county of Allegan, in said State of Michigan, having its Southern or Eastern terminus in said city of Mansfield, Ohio, and its Northern or Western terminus in the town of Allegan, aforesaid, and with an authorized capital stock of $4,000,000.

And your orator further says, that said defendant company being so organized, and vested with the powers and privileges of railroad companies in the States of Ohio and Michigan, located, estab-
4 lished and commenced the construction of its said railroad on its said authorized line, and on the first day of October, 1871, and subsequently during the year 1872 was lawfully engaged in constructing its said railroad. That said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company while so engaged in constructing its said railroad, and being desirous of borrowing money upon its bonds, the same to be secured by a pledge of its property and income, in order to obtain the money necessary for the completion and equipment of its said railroad, did on the first day of October, 1871, duly make and deliver to the defendant, George W. Cass, and one Thomas A. Scott, since deceased, as trustees, its deed of trust or mortgage on its road bed, property franchises and income for the benefit of the holders of said bonds, the same being, 4460 in number, each of the sum of one thousand dollars, making a total of $4,460,000; and said Scott and Cass then and there accepted said trust with all the duties and obligations incident thereto.

Your orator further says, that furthering the construction of the said railroad, as aforesaid, and on or about the 20th day of July, 1871, the said defendant, The Mansfield, Coldwater & Lake Michigan Railroad Company entered into a contract in writing with the defendant, The Pennsylvania Company, a copy of which contract is hereto attached marked Exhibit "B," and made a part of this bill of complaint, by which among other things, the said Pennsylvania Company bound themselves their successors and assigns to provide the necessary iron, chairs and spikes, to ballast and lay the track and sidings over and upon the line of railroad of said defendant, The Mansfield, Coldwater & Lake Michigan Railroad Company, to fence the same, to build depots, station houses, water houses, and all other buildings; to place said road in first class condition for traffic, and especially to build at Mansfield, O., suitable machine and work shops for said railroad, and to build, at Coldwater, Michigan, suitable shops, such as would accommodate the business and necessities of the road, within two years from the date thereof. And said Pennsylvania Company further bound itself to equip and operate the whole line as a first-class railroad and to maintain the same. In consideration of the foregoing obligations of said
5 defendant, The Pennsylvania Company, the defendant, The Mansfield, Coldwater & Lake Michigan Railroad Company, agreed that its preferred stock should be issued to the amount of the actual expenditures at cash values made by said Company in doing the work aforesaid, and in obtaining the right-of-way and grounds

therein mentioned; said stock to be entitled to dividends equal to 7 per cent. out of the net earnings of said road, and to be the only stock issued except as thereafter provided to be issued to said Pennsylvania Company. Said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company further agreed to deliver to said Pennsylvania Company, bonds and common stock of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company in the following amounts, to wit:

Bonds to the amount of twenty thousand dollars on each mile of track laid on the line of said road, from the center of the Northeast quarter, section 3, Springfield Township, Richland County, Ohio, west to the western terminus of said road at Allegan, in the State of Michigan; and common stock to an amount in par value five thousand dollars greater than the whole amount of stock issued for all other purposes; said bonds and stock to be delivered to said defendants, George W. Cass, and said Thomas A. Scott, now deceased, as trustees, for delivery to said Pennsylvania Company as fast as material should be delivered by said Pennsylvania Company to the value thereof, and in full as each ten miles of iron should be laid and the track put in condition for the passage of trains.

And your orator further says that the bonds and deed of trust in this agreement referred to, are the same as in this bill before set out and referred to by your orator.

Your orator further says, that afterwards, and on or about the 4th day of May, 1872, the said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, entered into another contract with the defendant, The Pennsylvania Company, by which the said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, delivered to the defendant, The Pennsylvania Com-
6 pany, all of its bonds executed as aforesaid, aggregating 4,460 in number, and in value $4,460,000. In consideration of the delivery of said bonds as aforesaid, and simultaneously therewith as a part of said transaction, the said Pennsylvania Company by its President, the said Thomas A. Scott, executed and delivered to said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, a written undertaking bearing date May 4th, 1872, a copy of which is hereto attached marked exhibit "C," and made part hereof, wherein it was recited that said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, has delivered to said Thomas A. Scott and George W. Cass as trustees, the bonds before described under said contract of July 20th, 1871, by the terms of which, said bonds were to be delivered to said Pennsylvania Company at the rate of twenty thousand dollars per mile as fast as material should be delivered to the value thereof, and in full as each ten miles of iron should be laid and the track in condition for the passage of trains; after which recital it was stipulated and agreed by said Pennsylvania Company that in consideration of the delivery of all said bonds as aforesaid, before said iron was laid and the other conditions performed, the said Pennsylvania Company obligated itself to take care of and pay all interest coupons which might become due thereon, prior to the completion of said

line of railway for traffic; and it was further provided that for all interest so paid by the Pennsylvania Company, and not justly chargeable thereto under said contract of July 20th, 1871, said Pennsylvania Company should be reimbursed out of the earnings of said railroad, after the same should be completed in sections under said contract, and begin to make earnings on the respective sections, as required by the terms of said agreement.

And your orator further avers, on information and belief, that all of said bonds remained in the possession and under the sole control of the said Pennsylvania Company, from the time of their delivery as aforesaid, until the time of the sale of said railroad property and the distribution of the proceeds thereof by this court, more fully set out hereafter in this bill of complaint by your orator, and no one at any time had any interest in said bonds except the said defendant, The Pennsylvania Company, and the defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company.

7 Your orator further says on information and belief that on or about the date of May 1st, 1872, the said defendant, The Pennsylvania Company, wrongfully obtained one million five hundred thousand dollars of the common capital stock of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, being more than a majority of all stock issued by said Company, claiming at the time to be entitled thereto under said contract of July 20, 1871; and claiming the ownership of said capital stock, the said Pennsylvania Company ever after said date of May 1st, 1872, until the sale of said railroad property and the distribution of the proceeds by this court as aforesaid, managed and controlled the affairs of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, and thereby secured a majority of the members of its Board of Directors; and absolutely influenced and controlled all of the corporate acts of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company in the matters and things hereinafter more fully set out and complained of. And your orator avers, that when said Pennsylvania Company so obtained said capital stock, it had in no way complied with any part of its undertaking hereinbefore mentioned, nor had it earned the same, or in any way become entitled thereto; nor did it ever after become so entitled thereto, or to any voting power or other interest therein. On the contrary, your orator avers, that said Pennsylvania Company entirely failed to perform upon its part, its said undertaking of July 20th, 1871, that it finished no portion of said railroad as therein provided for, and in no way earned an ownership in the bonds and capital stock aforesaid.

Your orator further says on information and belief, that afterwards, and on or about the 20th day of January, A. D. 1876, the said Thomas A. Scott and the said defendant, George W. Cass, as the trustees aforesaid, under said deed of trust, or mortgage as aforesaid, filed in this Court their bill of complaint praying for the foreclosure of said mortgage and the sale of said mortgaged premises; averring in said bill of complaint, among other things, the insolvency of said defendant, The Mansfield, Coldwater and Lake Mich-

igan Railroad Company, and its failure to pay the interest on its said bonds as the same matured, which cause was entitled,
8 "Thomas A. Scott and George W. Cass *vs.* The Mansfield, Coldwater and Lake Michigan Railroad Company, and Swan, Rose & Hutchinson, by Amendment," and numbered on the Chancery docket of this Court 2,857. And afterwards, and on or about the 17th day of April, A. D. 1876, the said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company filed in this Court its answer to said bill of complaint, and therein specifically denied each material allegation of the said bill of complaint, and set up a full and complete defense to the action in said bill of complaint set forth by said trustees as aforesaid. And afterwards, and on or about January 3d, 1877, the said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, by its solicitors, withdrew its appearance before then entered in said suit, and also withdrew its said answer, before filed therein, and made no defense to said bill of complaint; and on the 21st day of March, A. D. 1877, a decree *pro confesso* was entered in said suit against the said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, and in favor of the complainants in said bill of complaint; and afterwards, during the April term, 1877, of this Court, in said cause, a decree of foreclosure, and an order of sale was made, and in pursuance thereof the said railroad property was sold August 8th, 1877, and conveyed to Joseph Lessley, in trust for said defendant, The Pennsylvania Company, for the sum of $500,000. Your orator further says, that other proceedings were had by this Court in said cause, all of which are material to the complaint herein made by your orator, and a duly certified transcript from the Records of this Court, made in said cause, is hereto attached, marked Exhibit "D," and made a part of this bill of complaint.

And your orator further says, on information and belief, that all of the proceeds of said sale were applied to the payment of the principal and interest of said bonds held by the said defendant, The Pennsylvania Company, and no portion thereof came to the defendant, The Mansfield, Coldwater and Michigan Railroad Company, or was applied to the payment of the debts and liabilities of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company.

And your orator further says, on information and belief, that at the time of the execution of said bonds and said deed of
9 trust by said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, and at the time of the acceptance of said trust by said defendant, George W. Cass and said Thomas A. Scott, and during the time of all the acts in this bill complained of, the said Thomas A. Scott was the President of said defendant, The Pennsylvania Company, and its chief executive officer with such power and influence as to be able to control and direct all acts of said defendant, The Pennsylvania Company in the premises; that in accepting said trust, in making the several contracts hereinbefore referred to, between the said defendant, The Pennsylvania Company, and the defendant, The Mansfield, Coldwater and

Lake Michigan Railroad Company, in the commencement and prosecution of the chancery proceedings in this court before referred to, and in all acts of his, as trustee under said deed of trust, said Thomas A. Scott was moved by and acted wholly in the interest of said defendant, The Pennsylvania Company, to the destruction of the interests of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, and its stock-holders whose interests he was bound to protect and serve, under the duties and obligations of said trust. And your orator further avers, that said defendant, George W. Cass, co-trustee with said Thomas A. Scott as aforesaid, had full knowledge of the relations of said Thomas A. Scott to said Pennsylvania Company, of his aims and motives as aforesaid, and conspiring with him in the furtherance of said aims and motives as aforesaid, did in all manners and ways in his power as said co-trustee assist said Thomas A. Scott in the premises, in forwarding the interests of said Pennsylvania Company to the detriment and injury of the defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company and its stock-holders.

Your orator further says, on information and belief that said defendant, J. Twing Brooks during all the time of the acts herein complained of, was a director of the said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, and owed to said Company the duties and obligations incident to such official position; that at the same time, and during all of said time, he was also the General Attorney for the said defendant, The Pennsylvania Company, and the legal Counsel and Advisor of the defendant, George W. Cass and said Thomas A. Scott as trustees, and as their solicitor brought the suit to foreclose the mortgage hereinbefore referred to, and in all his acts in the premises the said defendant, J. Twing Brooks was moved by, and acted wholly in the interest of said Pennsylvania Company, disregarding the interests of the defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company and its stock-holders in violation of his official obligations as director as aforesaid.

And your orator further says, on information and belief, that the said defendants, Reuben F. Smith, George W. Layng and Frank Janes, during the time of the acts herein complained of were Directors of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, and owed to said Company the duties and obligations incident to such official position; that at the same time, and during all of said time, they were also employés of the said defendant, The Pennsylvania Company, and were made Directors of said defendant, The Mansfield Coldwater and Lake Michigan Railroad Company, at the instigation of said Thomas A. Scott for the sole purpose of carrying out the plans and schemes as aforesaid of the said defendant, The Pennsylvania Company, and in all their official acts as Directors, said defendants, Reuben F. Smith, George W. Layng, and Frank Janes were moved by, and acted wholly in the interests of said Pennsylvania Company disregarding the interests of the defendant, The Mansfield, Coldwater and Lake Michigan

Railroad Company and its stock-holders in violation of their official obligations as Directors as aforesaid.

And your orator further says, on information and belief, that the defendants, F. A. Gorham, Henry C. Hedges, and Stephen B. Sturges, during all the time of the acts herein complained of, were Directors of the said Defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, and ever since have been, and still are, such Directors, and said defendants, J. Twing Brooks, George W. Layng, Reuben F. Smith, and Frank Janes, have also been directors of said defendant, The Mansfield, Coldwater and Lake Michigan
11 Railroad Company, since the time of their first election as aforesaid, and still are such Directors.

Your orator further says, on information and belief, that the said defendant, George W. Cass, and said Thomas A. Scott as trustees, assisted by their legal counsel, the defendant, J. Twing Brooks, prosecuted the suit in this Court before referred to, and acted therein in the interest of the defendant, The Pennsylvania Company. That their interest and purpose was to destroy so much of the road of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company as lies west of the Town of Tiffin, in the County of Seneca, in said State of Ohio, and to sink and destroy its stock; that the interests of said trustees, and of said Pennsylvania Company, and of the holders of said bonds were one and identical. That by the terms of said agreement of said Pennsylvania Company, of May 4th, 1872, said Company was bound to pay the interest alleged to have matured upon said bonds, and the subsequently accruing interest thereon until the full completion of said road by said Pennsylvania Company, under its said agreement of July 20th, 1871; that said Thomas A. Scott, as President of said defendant, The Pennsylvania Company, acted for said company in making the contracts aforesaid, and controlled and directed the action of said trustees in the prosecution of said suit, as well as the actions of said defendant, J. Twing Brooks, his solicitor in said suit, and the defendants, George W. Layng, Reuben F. Smith, and Frank Janes, his employés, and all being Directors of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company.

Your orator further says, on information and belief, that the allegations of the said bill of complaint, filed as aforesaid, by said Thomas A. Scott and defendant, George W. Cass, to the effect that the bonds of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, had been lawfully issued to the amount of $1,600,000; that the interest thereon was over due and unpaid; that the defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, was insolvent, and all the other material allegations of said bill of complaint were not true, and were, at the time of filing said bill, and during the pendency of said
12 suit, known to be untrue by said trustees, and said defendant, J. Twing Brooks. And on the other hand, your orator avers, on information and belief, that the allegations of the answer of the defendant, The Mansfield, Coldwater and Lake Michigan

Railroad Company, denying all the material allegations of said bill of complaint were true, and all the averments of said answer were true, and known to be true by said trustees and said defendant, J. Twing Brooks, at the time said answer was withdrawn as aforesaid.

And your orator further avers, on information and belief, that the existence of said contract hereto attached, and marked Exhibit "C," was, at the time of the withdrawal of said appearance and answer, and the entering of the decree, purposely concealed from the Court, and at all times concealed from the stock-holders as a part of the conspiracy and fraud aforesaid.

And your orator further avers, on information and belief, that at a meeting of the Directors of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, held at the Boody House, in Toledo, Ohio, on the 24th day of January, 1876, at which were present H. C. Lewis, the President of said company, now deceased, the defendants, Reuben F. Smith, J. Twing Brooks, Henry C. Hedges, Stephen B. Sturges; also Joseph Fisk, now deceased, F. V. Smith, also now deceased, and V. P. Collier; by a resolution duly passed, the attorneys of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, were instructed to make defense to the suit of said trustees as aforesaid, and all of said Directors so present voted in favor of said resolution, except said defendant, J. Twing Brooks, who voted no.

And your orator further says, that there was a meeting of the Directors of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, held in the city of Toledo, November 3d, 1876, at which were present H. C. Lewis, the President, now deceased, Henry C. Hedges, Stephen B. Sturges, Reuben F. Smith, J. Twing Brooks, F. A. Gorham, Joseph Fisk, now deceased, and the said defendants, George W. Layng and Frank Janes, employés of said defendant, The Pennsylvania Company, and made Directors of said defendant, The Mansfield, Coldwater and Lake Michi-
13 gan Railroad Company, since the Directors' meeting before referred to, of date January 24th, 1876, at which meeting, of November 3d, 1876, by resolution the attorneys of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company were instructed to withdraw all defense to the said suit of Thomas A. Scott and George W. Cass, trustees, and to cease all opposition to the claims of said Trustees in said action.

Of the directors so present at this meeting all voted in favor of this resolution except the defendants, Henry C. Hedges and Stephen B. Sturges, who voted no, and entered their written protest against its passage.

And your orator further says, on information and belief, that the defense of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, to the suit of said Thomas A. Scott and George W. Cass, was withdrawn as aforesaid in pursuance of said action of said Board of Directors as aforesaid.

And your orator further says, on information and belief, that the said action of the said Board of Directors withdrawing, said defense

was solicited by said Thomas A. Scott, in the interest of said defendant, The Pennsylvania Company, and secured by said J. Twing Brooks in the same interest, through the aid and support of said Reuben F. Smith, George W. Layng and Frank Janes, all employés of said defendant, The Pennsylvania Company, and acting in the interest of said Pennsylvania Company, under the instruction of J. Twing Brooks, its General Attorney, and said Thomas A. Scott, its President. All of whom were also aided and abetted by Henry C. Lewis, the President of said defendant, the Mansfield, Coldwater and Lake Michigan Railroad Company, now deceased, and Joseph Fisk, a Director of said company, also now deceased; both of whom your orator avers were Directors of the Coldwater, Marshall and Mackinaw Railroad Company, to which company was to be given by said Thomas A. Scott and George W. Cass, trustees, a large portion of the property of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, to induce said Lewis and Fisk as Directors of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company to favor the withdrawal of said answer and defense, as aforesaid.

14 And your orator further says, on information and belief, that the withdrawal of said defense was the fraudulent act of said Thomas A. Scott and J. Twing Brooks, aided and abetted by such of said Directors as voted in favor of said withdrawal, all conspiring together to cheat said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company and its stock-holders, and benefit said defendant, The Pennsylvania Company. And your orator further says that all of the proceedings of this court in said cause subsequent to the withdrawal of said defense were fraudulently procured from this court, to the detriment of the rights of the defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company through the efforts and solicitations of said defendants, Thomas A. Scott and J. Twing Brooks, aided and abetted by the directors of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, as aforesaid.

Your orator further says, on information and belief that in the furtherance of said fraudulent scheme of said defendant, The Pennsylvania Company, one Joseph Lessley, an employé of said Pennsylvania Railroad Company bid off the property of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, covered by said trust deed, and sold by this Court in said cause, and the same was conveyed to him by the order of this court in said cause. But your orator avers that in bidding off said property and taking the conveyance thereof, said Lessley acted only as the agent or Trustee of said defendant, The Pennsylvania Company, and that the only real party in interest in said purchase and conveyance was said defendant, The Pennsylvania Company.

Your orator further says, on information and belief, that said defendant, The Pennsylvania Railroad Company claims to have had some interest in the said bonds of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, held by the said defendant, The Pennsylvania Company; but your orator avers that

said Thomas A. Scott, during all the time of the acts herein complained of, was the President of both, the said Pennsylvania Company, and the said Pennsylvania Railroad Company; that
15 both the said Companies were organized and controlled by the same persons, and had the same business interests, aims and undertakings; that if the said Pennsylvania Railroad Company had any interest in said bonds, the same was acquired with full knowledge of all the fraudulent acts in connection with said bonds, in this bill of complaint set forth, and said interest was acquired by said defendant, The Pennsylvania Railroad Company for the purpose of aiding and abetting said defendant, The Pennsylvania Company in wrongfully wresting from the defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, its railroad and other property as aforesaid.

Your orator further says, on information and belief that to carry out its fraudulent scheme as aforesaid, said defendant, The Pennsylvania Company organized and caused to be incorporated, the defendant, The Northwestern Ohio Railway Company, and that said Northwestern Ohio Railway Company is now the nominal owner of so much of the railroad of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company as lies between the town of Tiffin and the city of Mansfield, in the State of Ohio, and that said defendant, The Pennsylvania Company is now, and ever since the sale thereof by this Court as aforesaid, has been operating that part of said railroad as the nominal lessee of said Northwestern Ohio Railway Company.

And your orator further says, on information and belief, that in its incorporation, organization and in its business interests, said Northwestern Ohio Railway Company is but a branch of said defendant, The Pennsylvania Company, and in their relations to said portion of said railway between Tiffin and Mansfield, the two said corporations are identical.

Your orator further says, on information and belief, that in the operation of that part of said railroad, between Tiffin and Mansfield, the said Pennsylvania Company has accumulated large earnings, and made large profits, but that the amount of such earnings and profits are unknown to your orator.

Your orator further says, on information and belief, that said defendant, The Pennsylvania Company, has derived large revenue and receipts from sales, leases and other sources, from that
16 portion of the railroad and other property of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, lying west of the town of Tiffin, Ohio, and between said town of Tiffin and said town of Allegan, in the State of Michigan; but the amount of said revenue and receipts is unknown to your orator.

And your orator further says, on information and belief, that said defendant, The Pennsylvania Company, is now operating and will continue to operate said railroad between said towns of Tiffin and Mansfield, and will by sale, lease, or otherwise, dispose of and encumber the balance of said railroad property lying between the towns of Tiffin and Allegan, as aforesaid, to the great and irrepara-

ble injury of the defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company and its stock-holders, unless restrained by the order of this court, and will also so manage the affairs of said portion of said railroad between the towns of Tiffin and Mansfield as to destroy the receipts and profits now derived therefrom, and so keep the accounts of such receipts and profits that it will be impossible for this court or the defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company to ascertain therefrom the true amount thereof.

And your orator further avers, that until very recently, neither he nor any of those whom he represents, had any knowledge of the contract of May 4th, 1872, hereinbefore referred to, by which said Pennsylvania Company was bound to pay the interest as it accrued upon the bonds set out by said Thomas A. Scott, and George W. Cass in their bill of complaint, and he believes that such knowledge was purposely kept from your orator and other stock-holders, as well as from some of the Directors of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, by said defendant, The Pennsylvania Company, and said Thomas A. Scott, Trustee, and J. Twing Brooks a Director of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, for the sole purpose of carrying out the fraudulent scheme of said Pennsylvania Company, before referred to

And your orator further says, on information and belief, that at the time of the sale of said property by this Court, and the ap-
17 plication of the proceeds of said sale by this Court to the payment of interest upon the bonds claimed to belong to said defendant, The Pennsylvania Company, said Pennsylvania Company was under obligation to pay said interest, by the terms of said contract of May 4th, 1872, and there was no liability on the part of the said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company to pay the same.

All of which facts were known to the said Pennsylvania Company, said Pennsylvania Railroad Company, said Thomas A. Scott, and George W. Cass, trustees, said J. Twing Brooks and the other Directors before referred to as assisting them in said fraudulent scheme, and each and all of them conspired to keep such knowledge and did keep such knowledge from your orator and other stockholders, as well as from some of the Directors of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, not in the conspiracy aforesaid.

And your orator had no knowledge of any of the fraudulent acts hereinbefore complained of, until very recently accidentally discovered.

And your orator further says, on information and belief, that all such actings, doings and pretenses of the said several defendants are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator, and those whom he represents in the premises. In consideration whereof, and forasmuch as your orator is entirely remediless in the premises, according to the strict rules of the common law, and can only have

relief in a court of equity, where matters of this nature are properly cognizable and returnable, your orator prays:

That all the proceedings had by this court in said cause, in which said Thomas A. Scott and George W. Cass, trustees, were complainants, and said The Mansfield, Coldwater and Lake Michigan Railroad Company and others were defendants, after the filing of said answer by said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, including the withdrawal of said answer, the final decree of foreclosure, order of sale, and all other proceedings had in said cause be vacated, set aside and held for naught; that said answer be re-instated in said cause, and that said
18 cause be held for further hearing upon the issues joined by the said bill of complaint and the said answer; that said defendant, George W. Cass, surviving trustee under said trust deed, be required to account as such trustee for the entire proceeds of said sale; that said defendants, The Pennsylvania Company, and The Northwestern Ohio Railway Company, be held to have received the rents, issues and profits from all of said railway property as aforesaid, in trust for the benefit and use of the defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, your orator and those whom he represents, and be required to account for the same as such trustees; that a receiver may be appointed to take possession of said railroad property, with the usual rights and powers of a receiver in like cases; that it may also please your Honor to grant to your orator a writ of injunction issuing out of, and under, the seal of this Honorable Court, directed to the defendants, The Pennsylvania Company, and the Northwestern Ohio Railway Company, restraining them from further selling, leasing, or otherwise encumbering any of the property of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, during the pendency of this suit, and also that it may please your Honor to grant unto your orator the writ of subpœna of the United States of America, to be directed to the said The Mansfield, Coldwater and Lake Michigan Railroad Company, The Northwestern Ohio Railway Company, The Pennsylvania Company, The Pennsylvania Railroad Company, George W. Cass, Reuben F. Smith, J. Twing Brooks, George W. Layng, Frank Janes, F. A. Gorham, Henry C. Hedges, and Stephen B. Sturges, thereby commanding them and every one of them at a certain day, and under a certain pain therein to be specified, personally to be and appear before your Honors in this Honorable Court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your Honors shall seem meet, and that your orator may have such further and other relief in the premises as the nature of his case shall require, and to your Honors shall seem meet, and your orator shall ever pray.

——— ———,

Solicitors for Complainant.

19 STATE OF OHIO, } ss:
County of Seneca, }

Charles Foster being duly sworn, deposeth and saith, that he is the Complainant in the foregoing bill named, and has read the same and knows the contents thereof; that the said bill is true of his own knowledge, except as to those matters which are therein stated to be on information, and as to those, he believes it to be true.

—— ——.

Sworn to before me, and subscribed in my presence, this — day of August, 1887.

—— ——,
Notary Public, Seneca County, Ohio.

20 EXHIBIT "A"

FOSTORIA, OHIO, *July 13th*, 1887.

To The Mansfield, Coldwater and Lake Michigan Railroad Company; and Henry C. Hedges, Vice President of said Company, Stephen B. Sturges, Reuben F. Smith, J. Twing Brooks, George W. Layng, Frank Janes, F. A. Gorham, Victory P. Collier and D. D. Hughes, Directors and Stockholders of said Company:

You are hereby requested to commence proceedings to vacate the decree in foreclosure rendered, and to set aside the sale made in the case of Thomas A. Scott and George W. Cass, Trustees, against the Mansfield, Coldwater and Lake Michigan Railroad Company, at the December term 1875 of the Circuit Court of the United States, for the Northern District of Ohio, and the ancillary proceedings taken thereto in the United States Circuit Court for the Eastern District of Michigan, for the following reasons:

That the allegations of the bill of complaint in said cause were untrue, and known to be untrue by the complainant Trustees, who brought said action in fraud of the right of the stockholders of said defendant Ry. Co. by collusion with certain of the Directors of said Ry. Co.

That a good, sufficient and true answer was made to all the material allegations of said bill of complaint by said defendant Company and duly filed in said suit.

That said answer was corruptly and fraudulently withdrawn from said suit at the solicitations of the complainants, and under the directions of certain Directors of said defendant Company, conspiring with said complainants Trustees to defraud the stockholders of said defendant Company, and no defense was made to said bill of complaint by the officers of said defendant Company, although said Company had a good and valid defense to all the allegations thereof.

The said defendant Ry. Company was not insolvent at the time said suit was prosecuted, but on the contrary, had sufficient assets and property to meet all of its liabilities, and that this was well known to the complainants, and to the officers of said defendant

Company, who fraudulently conspiring together to defraud the stockholders of said defendant Company, neglected to set out such matters within their knowledge, which if properly set out would have worked a complete defense to the bill of complaint.

By reason of the foregoing negligent, wrongful and fraudulent acts of said complainant Trustees, and the said Directors and other officers of said defendant Company, the stockholders of said defendant Company have been wrongfully defrauded of all the property of said defendant Company sold under said proceedings in said United States Court.

Wherefore, you are notified that unless such proceedings to vacate said decree, etc., are commenced by you in the name of said defendant Company, or otherwise, within a reasonable time, the undersigned will commence such a proceeding on behalf of himself and all other stockholders of said defendant Company.

(Signed,) CHARLES FOSTER,
A Stockholder of The Mansfield, Coldwater and Lake Michigan Railroad Company, for himself and all other Stockholders.

21 EXHIBIT "B"

Construction Contract between M. C. & L. M. R. R. Co. and Penna. Co.

This agreement made and concluded the twentieth day of July, in the year of our Lord one thousand eight hundred and seventy-one (1871), by and between the Mansfield, Coldwater and Lake Michigan Railroad Company, a corporation existing under the laws of the States of Ohio and Michigan, of the first part, and the Pennsylvania Company, a corporation created and existing under the laws of the State of Pennsylvania, of the second part.

Witnesseth as follows: The parties of the first part hereby agree and bind themselves, their successors and assigns, to procure and pay for the right-of-way for the entire line of their road extending from Mansfield in the State of Ohio, as its Southern and Eastern terminus, to Allegan, in the State of Michigan, as its Northern and Western terminus, excepting only that which will extend from the crossing of the Pittsburg, Fort Wayne and Chicago Railway over Market street in Mansfield, west to the center of the North-east quarter of Section No. 3 in Springfield township, Richland county, Ohio, a distance of about seven miles and one thousand feet by the present line of the Pittsburgh, Fort Wayne and Chicago Railway, to properly grade the road-bed for the entire line of the right-of-way as aforesaid, and from time to time furnish and deliver, all the ties along the road, as may be needed, and at such suitable points as will be convenient for the laying down of the same, and build so many and such bridges as may be necessary at any and all point or points on and along said line, to procure in the name of the party of the first part, and to pay for such depot grounds and workshop properties, in such locations and quantities along the line, and at the terminus thereof as may be deemed by said second party necessary to successfully operate said line of railroad. To procure at

Mansfield, Ohio, ground for workshops, suitable in location and quantity for the erection of the machine and workshops of said line of railroad thereon, as shall be necessary for the road, and to procure at Coldwater, Michigan, grounds for the work and machine shops suitable in location and quantity for the erection of work and machine shops thereon for the use of said road. And the said parties of the first part agree and bind themselves, their successors and assigns, to locate said line of railroad, do all the grading, furnish all the ties for the same, as they may be needed, and do all other needful work to prepare the road-bed ready for the track to be laid, in a good substantial and workmanlike manner, that shall be at least equal in every respect, as to materials, workmanship, grades, curvature and alignment of the Grand Rapids and Indiana Railroad between Sturgis and Grand Rapids and be subject to the supervision and approval of said Pennsylvania Company, whose Engineer or other officer by them designated shall have full access to the work and authority to examine and direct the same, as it progresses and up to its final completion. And said work is to be finished in such time as in the judgment of the Engineer of the Pennsylvania Company will permit, the said Pennsylvania Company to lay the track and do all other work they hereafter agree to do, in order that the line may be ready for traffic between Mansfield and Tiffin,
22 within nine months from the date hereof, and the balance of the line within two years, and in such manner that the road when finished shall be furnished to the Pennsylvania Company for the purpose herein mentioned and intended, free from all debts and liabilities, other than those accruing as herein set forth. Preferred stock of The Mansfield, Coldwater and Lake Michigan Railroad Company shall be issued to the amount of the actual expenditures, at cash values, made by the said parties of the first part in doing the work as aforesaid, and obtaining the right-of-way and grounds mentioned, which stock shall be entitled to a dividend equal to seven per cent. out of the net earnings of said road, and it shall be the only stock issued except the common stock, as hereinafter provided to be issued to the party of the second part, the actual expenses of managing, maintaining and operating said road, paying interest on its bonds, and providing a sinking fund being first deducted in calculating said net earnings. Said preferred stock shall be convertible into common stock at the option of the holder, at any time within five years.

The said parties of the first part agree to deliver to the said parties of the second part, bonds and common stock as hereinafter mentioned in consideration for completing the road ready for trains, bonds of the party of the first part, to be dated first day of August, A. D. 1871, to the amount of twenty thousand dollars on each mile of track laid of the line of said road, from the center of the Northeast quarter of Section No. 3, in Springfield township, Richland county, Ohio, west to the western terminus of said road at Allegan, Michigan, the principal whereof shall be payable in forty years after date, in gold, in the city of New York, and bearing interest at the rate of seven per centum per annum, payable in gold in said city

of New York, said interest to be payable semi-annually on the first days of February and August, these bonds and the interest thereon, and a proper sinking fund for their redemption to be secured by the lien of a first mortgage upon the entire railroad extending from Mansfield to Allegan aforesaid, and all land, railways, rails, bridges, rights-of-way, stations, depot grounds, station houses, and all other buildings held and owned by the said party of the first part, for the purpose of operating and maintaining said railroad or the accommodation of the business thereof, and also all the tolls, income, rents, issues, and profits and alienable franchises, of the party of the first part, connected with said railroad or relating thereto, and also all the locomotives, stationary engines, tenders, cars of every kind, machinery, machine shops, tools, implements and materials connected with and necessary for the proper equipment, operating and conducting of said railroad, now owned, or hereafter to be acquired by the party of the first part, all of which are declared to be appurtenances of said railroad and to be used and sold therewith, and not to be separated therefrom, and are to be taken as part thereof. The said party of the first part shall also deliver to the said party of the second part an amount of its common stock as part of the consideration hereinbefore named, five thousand dollars greater than the whole amount of stock, which may have been issued, or be owned by said Company, for all other purposes; the said bonds and stock to be delivered to G. W. Cass and Thomas A. Scott, as trustees for
23 delivery to said Pennsylvania Company as fast as material is delivered to the value thereof and in full as each ten miles of iron is laid and the track in condition for passage of trains. In consideration of the premises, The Pennsylvania Company agree and bind themselves, their successors and assigns, to provide iron, chairs and spikes to ballast and lay track, and sidings over and upon said named line of railroad, to fence the same, to build depots, station houses, water houses and all other buildings, to place said railroad in first class condition for traffic, and specially to build at Mansfield, Ohio, suitable machine and work shops for said railroad, such shops to be of such capacity and size as will accommodate the business and necessities for the road; and further agree, so far as they can control the same, that the principal offices of said party of the first part shall be located and forever maintained at Mansfield, Ohio, and build at Coldwater, Michigan such other shops as will accommodate the business and necessities of the road within two years from the date hereof, provided the said party of the first part shall have performed their covenants so as render the same practicable; it being agreed that when consecutive sections of said road ten miles or more in length, commencing at either end or at accessible points upon intersecting roads are ready to be received and worked upon by the said party of the second part, work shall be commenced thereon at once, provided the said party of the first part shall give to the said party of the second part satisfactory evidence and security of their intention and ability to comply with all the covenants of this agreement. It is further agreed that, for any fencing which the party of the second part may do from time to time, the party of the first part

will in like manner issue to the party of the second part, preferred in stock (in addition to that hereinbefore limited to be issued) and common stock equal amounts at fifty per centum of the par value of each, to the amount of the cost of said fencing, and as the full equivalent for the same. And the said Pennsylvania Company further agree and bind themselves, their successors and assigns, that they will procure from the Pittsburgh, Fort Wayne and Chicago Railway Company, or the lessees thereof, the right to use, the Mansfield, Coldwater and Lake Michigan Railroad Company, its successors and assigns in common with said Pittsburgh, Fort Wayne and Chicago Railway Company, and its lessees, the road-bed and track of said last named Company from the crossing thereof over Market street, in Mansfield, Ohio, to the center of the northeast quarter of Section 3 in Springfield township, Richland county, Ohio, and will cause the same to be build thereon another track, in all respects first-class, and will guarantee to said Mansfield, Coldwater and Lake Michigan Railroad Company, its successors and assigns, the right to use said double track in perpetuity, in common with the Pittsburgh, Fort Wayne and Chicago Railway trains, but subject to the police and regulations of the Pittsburgh, Fort Wayne and Chicago Railway Company, said Mansfield, Coldwater and Lake Michigan Railroad Company hereby obligating themselves, their successors and assigns to pay for such use of the said tracks a *pro rata* of the earnings of all business carried (without charge for train service) payments therefor to be made each and every month, after the
24 use thereof has been commenced thereof for traffic, by the said Mansfield, Coldwater and Lake Michigan Railroad Company. And the said Pennsylvania Company further agree and bind themselves to equip and work the whole line aforesaid as a first-class railroad, taking, as is hereby mutually agreed they shall from the receipts thereof, the cost of managing, operating and maintaining the said road, and such further sum as may be reasonable for the use of and for maintaining the proper equipment thereof. And it is hereby mutually understood and agreed that the net earnings of the entire line of said railroad, after the payment of the expenses of management, maintenance, taxes and operating as aforesaid shall be directed to paying:

First, the interest on the hereinbefore mentioned bonds and sinking fund and the said monthly payments to the Pittsburgh, Fort Wayne and Chicago Railway Company or its lessees.

Second, the dividends on the preferred stock.

Third, dividends on the common stock, and the common stock shall receive no dividends until the preferred stock is paid its dividends out of the earnings, equal to seven per cent. out of the proceeds in any year, such net earnings will justify dividends being made.

And further, it is expressly herein acknowledged that the contract made and concluded by and between the Mansfield, Coldwater and Lake Michigan Railroad Company, and the Continental Improvement Company dated June the 8th, 1871, by which the joint use of so much of said Mansfield, Coldwater and Lake Michigan

Railroad Company's road as lies between the Grand Rapids and Indiana Railroad, and the village of Allegan, in the State of Michigan, is granted to said Continental Improvement Company and their assigns as stated in said contract, and to the extent, and on the terms and conditions therein stipulated, was made and concluded with the approval of the Pennsylvania Company, and that it is now herein expressly stipulated, that in supplying the iron and laying that portion of the Mansfield, Coldwater and Lake Michigan Railroad west of Martins Corners, as a separate work, The Pennsylvania Company are not to lose any right, or provisions for assuming the work to be done by the said Mansfield, Coldwater and Lake Michigan Railroad Company over the whole length of the line. And the said Mansfield, Coldwater and Lake Michigan Railroad Company in agreeing to the same and completing first the Section west of Martins Corners and arranging for its operation, in connection with the Grand Rapids and Indiana, and Michigan Lake Shore Railroads, does not yield or concede any part of their right to said section as an integral part of the entire railroad. The Boards of Directors of the first and second parties shall, by concurrent resolution, authorize, or shall by concurrent resolution, authorize, direct and empower their respective Presidents to authorize from time to time all increase and additions of real estate, second track, side-tracks, depots, shops, and other permanent improvements necessary for the present or future increase of the traffic on and over the hereby demised lines of railroads, whereupon the same shall be furnished, purchased and done by the second party out of their own proper monies, and when the same are so furnished, purchased and done, the first party shall
25 and will issue to the second party in repayment therefor, their bonds at par, bearing seven per cent. interest, to be secured by a mortgage on the road of the first party, and which with any renewal of the same (which renewals the first party agrees to make upon the request of the second party and for an amount sufficient to realize the sum necessary to retire such outstanding bonds, with all costs, expenses and discounts incident thereto,) shall be second in point of lien and priority, to the mortgage or mortgages or renewals there-of, hereinbefore recited in — here-of. It being stipulated and agreed that the second party shall and may have the right at any time to have such bonds or any of them, held by them respectively, exchanged for preferred capital stock of the first party at the par value thereof, which exchange the first party agrees to make, whereupon the said bond shall be deemed cancelled and paid, or said first party shall and will issue to said second party, at the option of said second party, in lieu of said bonds, their preferred capital stock, at par, in repayment as aforesaid.

For the true and faithful performance of this agreement and its covenants the said parties hereto bind themselves, their successors and assigns firmly by these presents.

Witness the common and corporate seals of the said corporations,

parties hereto, and the hands of their Presidents, the day and year hereinbefore first written.

WILLARD S. HICKOX,
President, Mansfield, Coldwater and Lake Michigan R. R. Co.

[Seal, M. C. & L. M. R. R. Co.]

Attest: H. C. HEDGES, *Secretary.*

For the Pennsylvania Company,
THOMAS A. SCOTT, *President.*

[Seal, Penna. Co.]

Attest: W. H. BARNES, *Secretary.*

Signed, sealed and delivered in presence of us.
HENRY C. HEDGES,
FRANK SEMPLE.

26 EXHIBIT "C."

PHILADELPHIA, PENN., *May 4th*, 1872.

This day W. S. Hickox, President of the Mansfield, Coldwater and Lake Michigan Railroad Company has delivered to G. W. Cass and Thos. A. Scott, Trustees, 4,460 bonds of said Company, numbered 1 to 4460 consecutively, for $1,000, or £200 each, dated Oct. 1, 1871, with interest coupons attached, (the coupons maturing April 1st, 1872, having been canceled and cut off), under the contract dated July 20th, 1871, between said M. C. & L. M. R. R. Co. and The Pennsylvania Company, which contracts provides that said Trustees shall deliver said bonds to said Pennsylvania Company at the rate of $20,000 per mile as fast as material is delivered to the value thereof and in full as each ten (10) miles of iron is laid, and the track in condition for the passage of trains. Now in consenting by the M. C. & L. M. R. R. Co. to deliver all of said bonds now, before the iron is laid, and in consideration thereof The Pennsylvania Company obligates itself to take care of and pay all interest which may mature prior to said M. C. & L. M. R. R. being in condition for traffic; and for all interest so paid by the Pennsylvania Company and not justly and equitably chargeable thereto, under said contract of July 20th, 1871, said Pennsylvania Company shall be re-imbursed out of the earnings of said M. C. & L. M. R. R. after the same shall be completed in sections, under said contract, and begin to make earnings on the respective sections as required by the terms of said agreement.

For the Pennsylvania Company,
THOMAS A. SCOTT, *Pres.*

27 EXHIBIT "D."

At a stated term of the Circuit — of the United States for the Northern District of Ohio, begun and held at Cleveland in said District on the first Tuesday in April, being the third day of the month, in the year of our Lord One Thousand Eight Hundred and

Seventy Seven, and of the Independence of the United States of America the One Hundred and First.

Present the Honorable Martin Welker, District Judge.

Among the proceedings then and there had were the following to-wit:

THOMAS A. SCOTT and GEORGE W. CASS *vs.* THE MANSFIELD, COLDWATER AND LAKE MICHIGAN Railroad Company, and Swan, Rose and Hutchinson. By Amendment.	2857.	Chancery.

Be it remembered, heretofore to-wit: On the 20th day of January, A. D. 1876, came the Complainants by their Solicitors and filed in the Clerk's office of said court their Bill of Complaint, which is in the words and figures following to-wit:

Bill. To the Honorable, the Judges of the Circuit Court of the United States for the sixth Circuit and the Northern District of Ohio. Thomas A. Scott, citizen and resident of the State of Pennsylvania, and George W. Cass, formerly a citizen of Pennsylvania and now a citizen and resident of the State of New York, bring this, their bill, against the Mansfield, Coldwater and Lake Michigan Railroad Company, a corporation duly created and organized under the laws of Ohio, and of Michigan for the construction of a railroad located within said sixth Circuit and partly within the Northern District of Ohio and partly within the eastern and partly within the western District of Michigan.

Said corporation being also a citizen of the State of Ohio and having its principal office in said northern District of Ohio, the same being hereinafter designated as the "Defendant Company."

I. And thereupon your orators complain and say, that on or about the first day of June, 1871, the defendant Company by virtue of certain articles of consolidation theretofore entered into in pursuance of the laws of Ohio, and of the laws of Michigan by and between the Mansfield, Coldwater and Lake Michigan Railway Company, a railroad company duly and legally incorporated and organized under the laws of Ohio, and the Ohio and Michigan Railroad Company, a railroad corporation duly and legally incorporated and organized under the laws of Michigan became and was duly and legally created, incorporated and organized as a railroad corporation of the States of Ohio and Michigan for the purpose of locating, constructing and operating a railroad from the city of Mansfield in Richland County, Ohio, through the counties of Richland, Crawford, Seneca, Hancock, Wood, Henry, Fulton and Williams in the State of Ohio, and through the counties of Hillsdale,
Branch, Calhoun, Barry, Kalamazoo and Allegan in the State
28 of Michigan, to the town of Allegan in said county of Allegan
and State of Michigan, having its southern or eastern terminus in the city of Mansfield, and its northern or western terminus in the town of Allegan aforesaid, and with an authorized capital stock of Four Million Dollars.

II. And your orators further say, that said defendant company being so created, incorporated and organized and vested thereby with the powers and privileges of railroad companies in the States of Ohio and of Michigan, did obtain *bona fide* subscriptions to its capital stock to a large amount; and it afterward in conformity with law and the powers vested in it locate and establish and commenced the construction of its said railroad on its authorized line, and between its termini aforesaid, to-wit: In the counties of Richland, Crawford, Seneca, Hancock, Wood, Henry, Fulton and Williams in the State of Ohio, and the counties of Hillsdale, Branch, Calhoun, Barry, Kalamazoo and Allegan in the State of Michigan, distance of about two hundred and twenty-three miles, and on the first day of October, 1871, and subsequently during the year 1872 was lawfully engaged in constructing its said railroad.

III. That said defendant Company while engaged in constructing its said railroad and being desirous of borrowing money upon its bonds, the same to be secured by a pledge of its property and income in order to obtains the means necessary for the completion and equipment of its said railroad, did on the first day of October, 1871, duly make and deliver to your orators as trustee its deed of trust or mortgage on its road bed property, franchises and income for the benefit of the holders of said bonds, the same being Four Thousand Four Hundred and Sixty in number, each of the sum of One Thousand Dollars or Two Hundred Pounds British sterling making a total of Four Million Four Hundred and Sixty Thousand Dollars or Eight Hundred and Ninety-Two Thousand Pounds British sterling, which said defendant company have duly resolved to issue from time to time and numbered from one to four thousand four hundred and sixty inclusive.

Said bonds to be made payable in gold coin of the United States of America or in British pound sterling to John Edgar Thompson or bearer thereof on the first day of October, in the year of one thousand nine hundred and eleven in gold coin aforesaid at the agencies of said defendant Company in the city of New York or London at the option of the holder, with interest thereon from the first day of October, 1872, at the rate of seven per cent. per annum, payable semi-annually in like gold coin, at said agencies on first days of April and October respectively in each year upon presentation and surrender of the annexed coupon as they should severally become due, all of which bonds were to be on an equality in respect to the security for the repayment thereof, notwithstanding the same might be issued at different times. By the terms of which said deed of trust or mortgage, in order better to secure the payment of their bonds mentioned, in said deed of trust or mortgage, and the interest thereon as the same should become due and for the purpose of vesting in your orators as trustees for the benefit of the holders of said bonds a security or lien on its property for the payment of said bond- and the interest thereon and in consideration of the sum of one dollar at the sealing and delivery of
29 said deed of trust or mortgage paid by your orators to said defendant company, the said company did grant, bargain,

sell and convey and transfer to your orators in trust, as joint tenants, but not as tenants in common and to the survivor of them, his heirs and assigns all and singular the railroad of said defendant company, constructed or to be constructed between its termini aforesaid and also all the property rights and franchises whatsoever, then held and thereafter to be acquired by said defendant company; including all railways, ways and rights of way and all the depot grounds and other lands, and all the tracks, bridges, viaducts, culverts, fences and other structures, and all the depots, stations, station houses, engine houses, car houses, freight houses, wood houses and other buildings, and all machine shops and all other shops held or acquired or which should be held or acquired for use *and* connection with the said railroad, or in connection with the business thereof; including also all the locomotives, tenders, passenger, baggage, freight and other cars, and all the other rolling stock and equipment and all the machinery, tools, implements, fuel and material for constructing, operating, repairing or replacing the said railroad, or the equipments or appurtenances of the said railroad, then held or thereafter to be acquired by the said defendant company, and including also all the franchises of said defendant company connected with or relating to the said railroad or the construction, maintenance or use thereof, together with all and singular, the tenements, hereditaments and appurtenances to the said railroad and premises or any part thereof, belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, tolls, incomes, rents, issues and profits thereof: and also all the estate right, title, interest, property, possession, claim and demand whatsoever as well in law as in equity of the said defendant company of, in and to the same and any and every part and parcel thereof, with the appurtenances as fully and completely in all respects and to all intents and purposes as if the said railroad had been at the date thereof fully constructed, completed and equipped, and all books of account, vouchers, kept and to be kept by the said defendant company, and relating to the said railroad, or to the business thereof, all of which by a true copy of said deed of trust or mortgage hereafter attached and marked "Exhibit A" and made a part of this bill, will more fully and at large appear. And your orators say that said deed of trust or mortgage was the proper and lawful act of said defendant Company, and that the same was authorized, executed and delivered by said Company in conformity with law, pursuant *of* the powers vested in it by law; and the same was duly recorded in the recorder's office of each of the counties in Ohio and Michigan in which said railroad was located, and has been constructed within one year from the date thereof, and that the same became and was valid conveyance for the purposes therein mentioned, and the trust therein created, and the same was duly accepted by your orators before the recording of said deed as aforesaid.

IV. And your orators further say that subsequently to the execution and delivery of the aforementioned deed of trust by said defendant Company to your orators, to wit: On or about the
30 first day of October, 1872, said defendant Company did in

pursuance of law, and of the powers vested in it by law, and for the express purpose of enabling said defendant Company to effect the sale and negotiation of said bonds heretofore described in article III of the bill, and of giving the purchasers and holders of said bonds the highest and best security within its power, make, execute and deliver to your orators, as trustees its supplemental deed of trust or mortgage wherein said defendant Company did grant, bargain, sell, convey and transfer to your orators as trustees, the railroad and all the properties, franchises, estates, rights and interests of any and every kind, incident and appurtenant to, or in any way connected with said railroad, or its business, the same being enumerated in article III of this bill, all of which by a true copy of said supplemental deed of trust or mortgage hereafter attached and marked "Exhibit B" and made part of this bill will more fully and at large appear, and your orators say that said supplemental deed of trust or mortgage was the proper act of said defendant Company, and that the same was authorized, executed and delivered by said Company in conformity with law and in pursuance with the powers vested in it by law, and the same was duly recorded within three months from the date thereof in the recorder's office in each of the counties in which the said railroad is located, and the same became and was a valid conveyance for the purposes therein mentioned, and the trust therein and thereby created and the same was duly accepted by your orators, before the recording of said supplemental deed as aforesaid.

V. And your orators further say that the said defendant Company at and about the time of executing and delivering the said first and supplemental deeds of trust hereinbefore described, issued and sold, and the same are now outstanding in the hands of *bona fide* and lawful owners thereof, the bonds mentioned in said original and supplemental deeds of trust and which are secured by the same, to amount of Sixteen Hundred Thousand Dollars, and that a large amount of interest has accrued thereon, which has not been paid, exclusive of the interest accruing thereon, viz: the sum of Two Hundred and Seventeen Thousand Dollars, $35,000 of which became due and was payable October 1, 1873; $35,000 of which became due and was payable April 1, 1874; $35,000 of which became due and was payable October 1, 1875; $56,000 of which became due and was payable April 1, 1875; $56,000 of which became due and was payable October 1, 1875; all of which sums severally still remain due and unpaid with the accrued and accruing interest thereon, and all payable in gold coin. That on the 19th day of October, 1874, the owners and holders of one thousand coupons, of the bonds hereinbefore mentioned, the same having become due and payable on October 1, 1873, and amounting to $35,000, did by their proper agent present said one thousand coupons for payment at the office of said defendant Company at Mansfield, Ohio, said Company having no offices or agency in either of the cities New York or London, and payment of said coupons was refused on the ground that defendant Company had no funds wherewith to pay the same, and your orators further say that said original and supplemental deeds

of trust are the first and paramount lien on the railway and properties therein mentioned.

31 VI. And your orators further say that by the terms of article fourteen of the supplemental mortgage hereinbefore described, the said defendant company did bind itself and agree to pay to your orators as trustees aforesaid under said deeds of trust on or before the first day of April, 1875 one per centum on the amount of said bonds that might be outstanding at that time, the sum so paid to be received and applied by your orators as trustees in the redemption of said bonds. That by virtue thereof the sum of sixteen thousand dollars became due and was payable at said date and should have been paid by said defendant company to your orators as trustees, to be applied by them to the redemption of said bonds to that amount. But your orators say that said Company has neglected and refused to pay your orators said sum of sixteen thousand dollars or any part thereof and the same now remains due and wholly unpaid.

VII. And your orators further say that by the terms of articles twelve and four of said supplemental deed of trust hereinbefore mentioned, it was provided that in case default be made in the payment of any semi-annual installments of interest, which might accrue on said bonds or any of them, or in case default should be made in the payment of the one per centum for sinking fund purposes hereinbefore referred to at the time and in the manner provided in said supplemental deed of trust, and according to the tenor of said deeds and the coupons thereof and if such default in the payment of any semi-annual installment of interest should continue for the space of sixty days after the same became due, or if such default in the payment of said one per centum for sinking fund purposes should continue for the space of six months after the same became due, then in each and every case of the happening and continuing of such default your orators as trustees, should, if so required by a majority in interest of the holders of said bonds then outstanding, declare the principal of each and every bond issued as aforesaid to be due and payable immediately, and that thereupon the same should at once become due and payable, notwithstanding that the time therein limited for the payment thereof might not then have relapsed, and your orators say that in pursuance of the powers therein granted to them and to the holders of said bonds, and your orators having been requested in writing by the holders and owners of a majority in interest of all said bonds outstanding so to do, your orators did by instrument in writing dated December 9th, 1875, and duly served on the Secretary of said defendant Company on the 14th day of December, 1875, declare the principal of all said bonds so outstanding to be due and payable immediately, and by virtue thereof, your orators say the principal of all said bonds is now due and payable.

VIII. And your orators further say that in addition to the indebtedness of said defendant company, created by bonds hereinbefore mentioned, the said defendant company has a large floating debt, the exact amount of which is not known to your orators, but upon

advice and information they believe the same to be not less than one hundred and fifty thousand dollars, neither are the parties to whom said floating debt is due known to your orators, all of which floating debt is due and unpaid and wholly unsecured. That
32 said defendant company is entirely insolvent and without any revenue wherewith to pay either its secured or unsecured indebtedness, or the interest accruing thereon, and that it is not possible that the rights of all parties interested can be properly ascertained or enforced in the premise otherwise than by a sale of the defendant company's railroad and its property and appurtenances covered by said several deeds of trust.

IX. In consideration whereof and inasmuch as your orators can only have adequate relief by the interposition of this Court as a Court of Equity, and to the end that said defendant company may answer your orators in the premises, and that as fully as if the same were again repeated, and they therein specially interrogated. May it please your Honors to grant your orators your writ of subpœna and compel the defendant company to appear and answer this bill, and that upon a final hearing a decree of sale of said railroad and of all properties and appurtenances therein mentioned in said several deeds of trust, may be made and that the proceeds thereof may be applied to the payment of the indebtedness secured by said deeds of trust, and that your Honors will grant to your orators such other and further relief as may seem just and equitable in the premises. R. P. Ranney and J. T. Brooks, solicitors for complainants.

"Ex. A." This indenture made the first day of October, in the year of our Lord one thousand eight hundred and seventy-one, between the Mansfield, Coldwater and Lake Michigan Railroad Company of the States of Ohio and Michigan respectively of the first part, and Thomas A. Scott of the city of Philadelphia, in the State of Pennsylvania, and George W. Cass of the city of Pittsburgh, in the same State of the second part, whereas the said party of the first part is an incorporated company duly formed and organized under the laws of the States of Ohio and Michigan respectively, for the purpose of constructing, operating and maintaining a certain railroad to be constructed from Mansfield in the said State of Ohio, to Allegan in the said State of Michigan, by the way of Coldwater in the said last mentioned State, and whereas for the purpose of procuring the means necessary to construct and equip the said railroad, the said party of the first part in pursuance of the powers and authorities in it duly vested, has resolved to issue an offer for sale and negotiation a series of four thousand four hundred and sixty bonds of one thousand dollars or two hundred pounds each, bearing date on the first day of October, A. D. 1871, and payable in forty years from date in gold coin of the United States of America, or in British pounds sterling at the option of the holder, and bearing interest at the rate of seven per centum per annum payable semi-annually in the like gold coin or pounds sterling, at the option of the holders of the coupons representing the same, and whereas the said bonds are all of like tenor and in the form following: "Know all men by these presents that the Mansfield, Coldwater and Lake Michi-

gan Railroad Company is indebted to John Edgar Thompson of the State of Pennsylvania or bearer, in the sum of one thousand dollars in gold coin of the United States of America or two hundred pounds British sterling, which sum the said company promises to pay to the said John Edgar Thompson or the
33 bearer hereof on the first day of October, in the year one thousand nine hundred and eleven in gold coin aforesaid at the agencies of the said company in the city of New York or London at the option of the holder, with interest thereon from the first day of October, one thousand eight hundred and seventy-one, at the rate of seven per cent. per annum, payable semi-annually in the like gold coin at the said agencies on the first days of April and October respectively in each year upon presentation and surrender of the annexed coupons as they severally become due, without deduction therefrom of any tax which may be payable on account thereof under any law of the States of Ohio and Michigan or of the United States now existing or hereafter to be enacted, the payment of all such taxes being assumed by said company in addition thereto, and it is hereby expressly declared and agreed that if default shall be made in the payment of any half yearly installments of interest on this bond when such interest shall become due and be demanded according to the tenor of any coupon hereto annexed, and if such installment of interest shall remain unpaid and in arrear for the period of six months after presentation and demand of payment of the coupon representing the same, the principal of the bond as well as the principal of each of the bonds of the series of which this bond is one may be declared and made to become due and payable immediately in the manner and with the effect provided in the deed of trust or mortgage executed by the said company to secure the payment thereof, which is hereinafter mentioned. This bond is one of a series of four thousand four hundred and sixty bonds of one thousand dollars or two hundred pounds sterling, each numbered consecutively from 1 to 4460 inclusively, and amounting in the aggregate to four millions four hundred and sixty thousand dollars, all of which bonds are of a like date and the payment whereof is equally secured by a certain deed of trust or mortgage bearing even date herewith, duly executed and delivered by said Company to Thomas A. Scott and George W. Cass, both of the State of Pennsylvania, as trustees, which conveys to the said trustees the railroad of said Company, constructed and to be constructed from Mansfield, in the county of Richland, and State of Ohio, to Allegan in the county of Allegan and the State of Michigan, being a distance of two hundred and twenty miles more or less, together with the equipments and appurtenances belonging to the said railroad company and the rights, privileges and franchises hereunto appertaining and which creates a sinking fund for the redemption of said bonds of one per cent. per annum, beginning on the first day of April, 1875, which sinking fund is to be applied by the trustees in the purchase and redemption of the said bonds at their par value. The bonds to be purchased and redeemed each year are to be drawn by lot by the trustees or some one of them, or a person authorized by them,

in the month of November of each year, first drawing to take place in November, 1875, at the agency of said Company in the city of New York, in the presence of said agent and a Notary Public, and a notice of the numbers drawn is to be published and posted at the offices where coupons are paid in London and New York on or before the first of February, after the drawing, and on the following first day of April, the principal of the bond so drawn shall
34 be payable at the option of the holder, at the offices and in the manner aforesaid, upon the surrender of the bond drawn with the matured interest coupons, and after the said first of April the interest on bonds so drawn shall cease. This bond shall pass by delivery unless registered on the books of the Company, but after registration of ownership, certified hereon by the transfer agent of the Company, no transfer hereof except upon the books of the Company shall be valid unless the last registration should have been to bearer and transferability by delivery thereby restored, and this bond shall continue subject to successive registrations and transfers to bearer at the option of the holder.

This bond shall not become obligatory upon the Company until the certificate endorsed hereon is signed by the trustees.

In witness whereof, the said Company have caused their corporate seal to be hereto affixed and the same to be attested by the signatures of their President and Secretary, and have also caused the coupons hereto annexed to be signed by their Secretary this first day of October, one thousand eight hundred and seventy-one. —— —— President, —— —— Secretary. And whereas, each of the said bonds has annexed thereto, coupons or interest warrants representing the several semi-annual installments of interest to fall due thereon, which coupons bear the lithographed signature of the Secretary of said party of the first part, and are omitting the date of payment in the form following:

$35.00. The Mansfield, Coldwater and Lake Michigan Railroad Co., will pay to bearer thirty-five dollars in United States gold coin, or seven pounds sterling, free of all taxes, at the agency of said Company in the city of New York or London, at the option of the holder on the first day of —— A. D. — being six months interest *and* that day on bond No. — —— —— Secy. Now therefore this indenture witnesseth: that the said party of the first part, in order the better to secure the payment of said bonds whether now executed or hereafter to be executed and issued, and without discrimination or preference between said bonds on account of the dates of the actual issue of any thereof, and for and in consideration of the premises and of the sum of one dollar to the said party of the first part duly paid by the said parties of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, and by these presents doth grant, bargain, sell, convey and transfer unto the said parties of the second part, to these presents as joint tenants and not as tenants in common, and unto the survivor of them, his heirs and assigns, all and singular the railroad of the said party of the first part or which the said party of the first part is by law authorized to construct, extending and to be constructed from

Mansfield, Richland county, in the State of Ohio, by way of Coldwater in Branch county, in the State of Michigan, to Allegan in Allegan county, in the said last mentioned State, and also all the property, rights and franchises whatsoever now held and hereafter to be acquired by the said party of the first part, including all the railways, ways, rights of way and all the depot grounds and other lands, and all the tracks, bridges, viaducts, culverts, fence and other structures, and all the depots, stations, station houses, engine houses, car houses, freight houses, wood houses and other buildings, and all machine shops held or acquired and which shall be held or acquired for use in connection with the said railroad or in connection with the business thereof; and including also all the locomotives, tenders, passenger, baggage, freight and other cars, and all the other rolling stock and equipment, and all the machinery, tools, implements, fuel and materials, for constructing, operating, repairing or replacing the said railroad, or the equipments or appurtenances of the said railroad now held or hereafter to be acquired by the said party of the first part; and including also all the franchises of the said party of the first part connected with or relating to the said railroad or the construction, maintenance or use thereof, together with all and singular the tenements, hereditaments or appurtenances to the said railroad and premises, or any part thereof belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, incomes, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said party of the first part, of in and to the same, and every part and parcel thereof, with the appurtenances as fully and completely in all respects and to all intents and purposes as if the said railroad were at the date hereof fully constructed, completed and equipped; and all books of account and vouchers kept and to be kept by the said party of the first part and relating to the said railroad and to the business thereof. To have and to hold the said railroad lands and premises and all the franchises and property hereinbefore described unto the parties of the second part, as joint tenants and not as tenants in common, and unto the survivor of them his heirs and assigns forever; but in trust nevertheless for the uses and purposes and with and subject to the powers, agreements and conditions hereinafter mentioned and set forth; That is to say: article first. Until default shall be made in the payment of interest on said bonds or some one of them, or in the payment of the principal of said bonds or some one of them, or in the payment of any contribution to the sinking fund hereinafter provided for the redemption thereof, or in the observance of any other covenants or agreements or agreements herein contained on the part or behalf of said party of the first part, the said party of the first part, its successors and assigns shall be suffered and permitted to remain in the actual possession of the said railroad and premises and to exercise the franchises and rights relating thereto, and to collect, receive and use the tolls, incomes, rents, revenues,

issues and profits thereof in any manner which will not impair the lien created by these presents.

And the said party of the first part hereby covenants, promises and agrees to and with the said parties of the second part, and the survivor of them and their and his survivors in the trust hereby created, that the said party of the first part shall and will diligently and faithfully use and apply the net proceeds of the negotiation of said bond, in and to the construction of said railroad, and they then remaining in possession of said railroad and premises, it shall and will keep the said railroad in good order and safe running condition and shall and will from time to time pay and discharge all taxes, assessments and governmental charges lawfully imposed on
36 said railroad and premises or any part thereof, and the lien of which might or could be held to be prior to the lien of these presents so that the priority of these presents may be duly preserved; and that the said party of the first part shall not and will not do and suffer any matter or thing whatsoever, whereby the lien hereof might or could be impaired until the said bonds and all interest thereon shall be fully paid and satisfied.

Article second. In case default shall be made in the payment of any semi-annual installment of interest which may accrue upon the said bonds or upon any of them, when such interest shall become due and be demanded, and if such interest or any part thereof shall remain unpaid and in arrear for the period of six months after demand thereof according to the tenor of the coupon representing the same, or according to the tenor of said bonds, or in case default shall be made in the payment for the purposes of the sinking fund hereinafter created, or in case default shall be made in the performance of the covenant of further assurance hereinafter set forth, or in case default shall be made in the payment of any taxes, assessments or other governmental charges which may be lawfully levied or imposed upon the said railroad and premises, or any part thereof, and a lien thereof might or could be held prior to the lien of these presents, and if any such default shall continue for the period of six months, or in case default shall be made in the payment of the principal of said bonds or any one of them, then and in any and every such case of default, it shall be lawful for the said parties of the second part, as such trustees, or the survivor of them in the trust hereby created, or for such person or persons as shall for the time being be charged with the execution of this trust, personally or by attorney or agent, to enter into and upon the railroad and premises hereinbefore granted or conveyed or expressed or intended so to be, and each and every part of the same, and from henceforth the said railroad and premises and each and every part thereof, and all and singular the rights and franchises hereinbefore granted to have, hold, possess and enjoy, operating the said railroad by such superintendents, managers, receivers, assistants, and servants, or other attorneys or agents, as the said trustee or trustees shall deem proper, and making from time to time all such repairs and replacements and all such useful alterations, additions and improvements to the said railroad and premises as the said trustee or trustees shall

deem expedient and judicious, and it shall likewise be lawful for the said trustee or trustees after any and every default happening and continuing as aforesaid, to collect and receive all tolls, fares, rents, freights, revenues, issues, incomes and profits of the said railroad and premises and every part and parcel thereof and to deduct therefrom all the expenses lawfully incurred in making such entry or otherwise obtaining possession of said premises as well as any and all expenses of holding, operating and managing the said railroad and premises and conducting the business thereof, and including the cost and expense of such repairs, replacements, alterations, additions and improvements as may be made by them or him as aforesaid, and all payments which may be made or be due for taxes or assessments or other charges or liens prior to the lien of these presents upon the said railroad and premises or upon any part or parcel thereof, as well as just compensation for their or his own
37 services, and for the services of such attorneys and counsel as may have been by them or him employed, and after making such deductions, to apply all tolls, incomes, rents, revenues, issues and profits of the said railroad and premises which may be received by them or him as aforesaid to the payment in the first place of all over-due interest on the said bonds, with interest thereon in the order in which said interest shall have become due and notably to the persons holding the bonds and coupons evidencing the right to such interest and without discrimination or preference between them on account of the time of the actual issue of said bonds; and in the next place to the payment of all interest accruing during such possession of said trustee or trustees, and if in any six months of such possession after payment of all interest on such bonds, a surplus of money arising as aforesaid shall remain, it shall be lawful for such trustees or trustee to pay over the same to the said party of the first part, its successors or assigns, or as any court of competent jurisdiction shall lawfully direct.

Article third. In case default shall be made in the payment of interest on any of said bonds and such interest shall remain unpaid and in arrear for the space of six months as aforesaid, or in case default shall be made in the payment of the principal of any of said bonds as aforesaid, it shall likewise be lawful for the said parties of the second part, being trustees under these presents, or for the survivor of them, or for the person or persons who shall for the time being with the execution of the trust by these presents created, after entry upon the said premises as aforesaid or without any entry thereon to sell and dispose, personally, or by attorney or agent of all and singular the railroad and *and* property, rights and franchises hereinbefore granted and conveyed or intended so to be, which shall then be or remain subject to the lien of these presents, at public auction, in the city of Mansfield, Ohio, or at any place in the line of said railroad, or in any of the counties, through which the same may run, which the said trustee or trustees may in their or his discretion designate and at such time as they or he shall appoint. But preparatory to such sale the said trustee or trustees shall give public notice of the time and place when and where the

same is to be made, by advertisement thereof in two newspapers published in the city of New York, and one newspaper published in the city of London in England, at least three times a week for three successive weeks, and by a like advertisement published at least once in each week for six successive weeks in one newspaper in the county of Richland in the State of Ohio, and in the county of Allegan in the State of Michigan. And it shall be lawful for such trustee or trustees to make and deliver to any purchaser or purchasers at such sale a good and sufficient deed or good and sufficient deeds in the law of the railroad or other property which shall be sold as aforesaid to such purchaser or purchasers, and it is hereby expressly declared and agreed that any sale or sales which shall be made as aforesaid shall be a perpetual bar both in law and equity against the said party of the first part, its successors or assigns, and against any and all persons whosoever claiming or to claim the railroad or other property so sold or any part or parcel thereof by, from, through or under the said party of the first part its successors or assigns.

38 And after deducting from the proceeds of such sale just allowance for all expenses connected therewith, including attorney and counsel fees as well as any and all advances, expenses and liabilities which may have been made or incurred by the said trustee or trustees in operating or mainta-ing the said railroad or in managing the business of the same, while the same shall have been in their or his possession or in arranging for and completing the sale aforesaid, and also all payments which may have been made by them or him for taxes or assessments and for charges or liens prior to the lien of these presents, if any such there shall be on the said railroad and premises or any part thereof, as well as just and reasonable compensation for their or his own services, the said trustee making or causing such sale to be made shall apply the purchase money and proceeds of such sale to the payment of the principal of said bonds as may be at that time outstanding and unpaid, whether or not such principal thereof shall have by the terms of said bonds previously become due, and of the interest which shall have accrued upon the said principal up to that time and the unpaid — with interest thereon, if the same shall be over due without discrimination as between principal and interest, but ratably to the aggregate amount of such unpaid principal and accrued and unpaid interest. It being understood and hereby declared and agreed that upon any sale of said premises which may be made as aforesaid or upon any sale thereof under or by virtue of the judgment or decree of any Court of competent jurisdiction rendered in any suit or proceeding for the enforcement or foreclosure of the lien hereby created, the principal of all the bonds aforesaid shall become and be immediately due and payable, which judgment shall be made to the persons holding the bonds and coupons evidencing the right of such principal and interest without discrimination or preference between them, on account of the actual issue of said bonds, and if after payment in full of the principal and interest of each and all of the said bonds including the interest

on over due coupons, a surplus of the same proceeds shall remain in the hand of the said trustee or trustees, they or he may pay over such surplus to the said party of the first part hereto, its successors or assigns, or as any court of competent jurisdiction shall lawfully direct. And it is hereby declared and agreed that the said trustee or trustees may adjourn such sale in their or his discretion by announcement made at the time and place appointed for such sale, and if so adjourning such sale they or he may make the same at the time and place to which the same shall be so adjourned and without further notice thereof. And it is further declared and agreed that the receipts of the trustee or trustees who shall make such sale or cause the same to be made shall be a sufficient discharge to the purchaser or purchasers of the property, which shall be sold as aforesaid for his or their purchase money, and that such purchaser or purchasers, his or their heirs, executors or administrators shall not after paying such purchase money and receiving such receipt be liable to see to the application of such purchase money upon or for the trusts or purposes of these presents, or be in any manner whatsoever answerable for any loss, misapplication or non-application of such purchase money or of any part thereof.

39 And it is hereby further declared and agreed that in case of default as aforesaid the party of the first part shall waive and does hereby waive the benefit of any appraisement, stay or extension law or laws, which now exist or shall hereafter be enacted.

Article fourth. It is hereby mutually agreed that any public sale of the railroad and property hereinafter conveyed made by virtue of the power hereinbefore granted or by judicial authority for the purpose of enforcing the lien of these presents, the trustee or trustees under these presents for the time being, may in their own or in his discretion personally or by agent or attorney bid for, and if the same be obtainable for the price hereinafter mentioned, purchase and acquire the property so offered for sale in behalf of all the holders of the bonds secured by this instrument which shall then be outstanding in proportion to the respective interest of such holders in said bonds and the coupons thereto belonging. Provided however, that nothing herein contained shall authorize the said trustee or trustees to bid on behalf of the holders of said bonds a sum exceeding the whole amount of said bonds then outstanding with the interest accrued thereon and the expenses of such sale for the entire property then held upon the trusts of this indenture, or an amount reasonably proportionate thereto for any part of the said property. And it is hereby further agreed, that the bonds and overdue coupons aforesaid shall be received in payment of the purchase money of any property sold at such sale, as equivalent to so much of the said purchase money as would be distributable and payable thereon.

Article fifth. In case default shall be made in the payment of any semi-annual installment of interest to accrue on any of the said bonds when such interest shall become payable, according to the tenor of said bonds as the same is hereinbefore set forth, on the terms of

any coupon thereto annexed, and if such interest shall remain unpaid and in arrear for the space of six months, then and in each and every such case of the happening and continuing of such default in the payment of interest, the principal of each and all of the said bonds may be declared by the trustees hereunder, or by a majority in interest of the holders of all said bonds then outstanding, at their option to be, and thereupon the same shall become due and payable immediately, notwithstanding that the time limited therein for the payment thereof may not then have elapsed; which declaration shall be made by an instrument in writing under seal, duly served on the said party of the first part, but if such option be exercised by the said trustees, any declaration made by them may be annulled or reversed by a majority in interest of the holders of said bonds, by a vote of such majority in interest of such bond-holders, given at a meeting of bond-holders convened and held as hereinafter provided, and attested by an instrument in writing under the hands and seals of the persons so voting, or their agents or attorneys thereunto lawfully authorized. Provided always, that no act or omission of the said trustees or of the said bond-holders in respect to any default in the payment of interest which may have happened, shall be held to exhaust and impair the option hereby granted or to extend to or affect any subsequent default or the rights arising therefrom.

Article sixth. It is hereby declared and agreed that on or before the first day of April, in the year one thousand eight hundred and seventy-five, and on or before the first day of April in each and every year thereafter, while the said bonds or any of them remain outstanding, the said party of the first part shall pay over to the trustee or trustees for the time being under these presents, the sum of one per centum on the amount of said bonds to be by the said trustees used and applied in the redemption thereof. The said trustee or trustees for the time being shall designate by lot so many of the bonds as they or he shall have money to pay, and give notice of the numbers designated personally to any owner or holders of bonds so designated known to them or him, and by advertisement in one or more daily newspapers in the city of New York once a week until the date of the next interest payment.

If any owner or holder of such bonds be unknown to them and on presentation and delivery of any such bonds, shall apply the money so received by them to the payment thereof, and all further interest on any of the bonds so designated not presented and delivered on or before the date of the said next interest payment shall cease from and after such date; and the Company shall be no longer liable for the said interest.

The trustees shall without reasonable delay cancel the bonds so redeemed by them and return such bonds to the Company, and the trustees and the Company shall keep separate registrys of all the bonds so redeemed or so designated for redemption, and the registry of the Company shall be at all reasonable times open to the inspection of each of the bond-holders and stock-holders of the Company, and the numbers and amounts of the bonds so redeemed or desig-

nated for redemption shall be reported by the Company in each annual statement made to the stockholders, and the cancelled bonds shall, on the request of the meeting of the stockholders be produced and exhibited.

Article seventh. It is hereby expressly declared and agreed that in case defaults shall be made in the payment of interest upon any of the said bonds, when such interest shall become payable and be demanded or in case default shall be made in any payment required by article sixth of these presents to be made into the sinking fund for the redemption of said bonds, and if such interest or sinking fund payment shall remain in arrear for the space of six months, or in case default be made in the payment of the principal of any of the said bonds when the same shall become due, then and in either and every such case of default it shall be the duty of the trustees under these presents to exercise the powers of entry and sale hereinbefore granted, or to take appropriate legal proceedings to enforce the rights of the holders of said bonds upon a requisition to that effect being made upon said trustee or trustees for the time being, signed by holders of at least five hundred thousand dollars in amount of said bonds upon a proper indemnification to said trustee or trustees against all costs and expenses to be by them or him incurred in the premises.

Article eighth. The trustee or trustees for the time being hereunder shall at all times during the continuance of the trust
41 hereby created have full power and authority to be exercised in his or their own discretion and not otherwise to release and convey to any party who may be designated in writing by the said party of the first part its successors or assigns to receive the same or to release from the lien or operation of these presents in such other manner as they or he may deem proper any portion of the premises heretofore granted which may be appurtenant to the said railroad, but which in the judgment of the said trustee or trustees for the time being shall be necessary for use in connection therewith and which shall have been acquired or held for stations, depots, shops or other buildings or for supplying fuel, gravel or other material, and also to convey or release as aforesaid on like request any lands not occupied by the track which may become disused by reason of a change in the location of any station house, depot, shop or other building connected with the said railroad, and such lands occupied by the tracks, and adjacent to such station houses, depots, shops or other buildings as the said party of the first part its successors or assigns may deem it expedient to desire or abandon by reason of such change and they or he may consent to any changes in the location of any depot, shop or other building which in their or his judgment shall have become expedient, and make and deliver the instruments necessary or proper to carry the same into effect.

Provided always that any lands and premises which shall be acquired for permanent use in substitution for any so released shall be conveyed to the trustee or trustees for the time being upon the trusts of these presents, and if no lands are so required within a rea-

sonable time in substitution for any so released, the net proceeds of the sale of the lands so released shall be paid over to the trustee or trustees for the benefit of the sinking fund hereinbefore created, and the said trustee or trustees shall have full power to allow the said party of the first part its successors or assigns from time to time to dispose according to its or their discretions of such portion of the equipments machinery and implements which shall be at any time held or acquired for the use of the said railroad as shall have become unfit for such use, but any and all new or other equipments, machinery and implements which may be acquired in substitution for any so released shall by virtue and force hereof become and be immediately upon the acquisition of the same subject to the lien and operation of these presents without any new conveyance or transfer or other act or ceremony whatsoever.

Article ninth. If the party of the first part shall well and truly pay all interest upon the said bonds when such interest shall become due and shall also well and truly pay and discharge the principal of each of the said bonds when the same shall become due according to the tenor of said bonds and the true intent and meaning of these presents, then and thereupon, that is to say, upon the payment of said bonds and all interest thereon, all the estate, right, title and interest of the said parties of the second part and of the survivor of them and of their or his successors in the trust hereby created, shall cease, determine and become void otherwise the same shall be and remain in full force and virtue.

Article tenth. It is mutually agreed by and between the parties hereto, that the said trustees shall be entitled to just and rea-
42 sonable compensation for all services which they may hereafter render in this trust to be paid by the said Company or out of the income of the property, that the said trustee shall not be answerable for the default or misconduct of each other or of any agent by them with reasonable care appointed, or for anything whatsoever in connection with this trust except willful misconduct or gross negligence or default, that the said trustees or either of them or any trustee hereafter appointed may be removed by the vote of a majority in interest of the holders of said bonds, cast at a meeting of said bond-holders duly convened and held and attested by the hands and seals of the chairman and secretary of such meeting or such removal may be made by a majority in interest of said bond holders by an instrument in writing under their hands and seals duly acknowledged. And it is further mutually agreed that either of the said trustees or any trustees or any trustee hereinafter appointed may resign and discharge himself of the trust created by these presents, by giving notice in writing to the said party of the first part, and to his co-trustee if there be such, at least three months before such resignation shall take effect unless shorter notice be accepted in writing by the said company and such co-trustee if there be such, and upon the due execution of the conveyance hereinafter required.

And it is hereby declared and agreed that in case at any time hereafter the said trustees, or either of them, or any trustee here-

after appointed, shall die or resign or be removed or become incapable or unfit to act in said trust, the holders of the bonds secured hereby acting by a majority in interest, shall be and they are hereby authorized and empowered by an instrument or instruments in writing, under their respective hands and seals, duly acknowledged as aforesaid, or by a vote of a meeting of said bond-holder, duly convened and attested as aforesaid, to appoint a successor or successors, when so appointed shall immediately upon his or their acceptance of the trust become vested with all the powers, authorities and estates held or possessed by the trustee or trustees to succeed whom he or they shall have been appointed, without any further conveyance or assurance. And thereupon all the powers and authorities hereunder and all the estate, right, title and interest in said premises of such resigned or removed trustee shall wholly cease and determine, but nevertheless the surviving or continuing trustee, if there be such, and the trustee or trustees resigning or being removed as aforesaid, shall upon the request in writing of the new trustee or trustees, execute and deliver to him or them all, such conveyances or other instruments as shall be fit and expedient for the purpose of assuring to such new trustee or trustees the legal estates in the premises.

And it is hereby declared and agreed that in case that the bond-holders shall fail or omit to a new trustee or new trustees in the manner aforesaid within sixty days after the death, resignation or removal of any trustee, application may be made by any holder or holders of said bonds to the aggregate amount of one hundred thousand dollars, in the name and on behalf of all the holders of said bonds, or otherwise upon reasonable notice to the said party of the first part its successors or assigns, and to the surviving or continuing trustees, if there are such, to any competent Court of
43 Jurisdiction in any of the counties of Ohio or Michigan through or into which such railroad is located, for the appointment of a new trustee or trustees.

And it is hereby further expressly declared and agreed that whenever and as often as any contingency shall arise, in which the action of a majority in interest of the bond-holders of said bonds shall be necessary, or in which the said bond-holders are herein declared to have any discretionary voice or power, it shall be the duty of the said trustees, and they or either of them shall be authorized and required to call a meeting of all the holders of bonds secured hereby, to be held in the city of New York, by advertisement (the expense whereof shall be a liability of the said party of the first part hereunder, and may be defrayed if necessary from any trust fund,) to be published three times in each week for six weeks, in two newspapers of good circulation amongst the business community of that city, one newspaper in the city of Mansfield, Ohio, and one newspaper in the city of London, and in default of such meeting being called by the said trustees or either of them, within thirty days after notification in writing to them by any bond-holder of the necessity therefor, it shall be competent for any holder or holders of said bonds to the aggregate amount of one hundred thousand

dollars, to call said meeting in the manner aforesaid; and at such meeting so convened the holders of said bonds shall be competent to exercise in person or by proxy all the powers and authorities conferred upon them by these presents. Provided, always, that nothing hereinbefore contained shall be held to require the said trustees to expend any of their personal moneys, or to incur any personal liability in the calling or holding of such meeting, and that at any meeting called as aforesaid a majority in interest of the holders of said bonds may prescribe and establish such rules as they may deem proper for the calling of future similar meetings, and the regulation of the proceedings thereof.

And this indenture further witnesseth: That the said party of the first part for the consideration aforesaid has promised and agreed and does hereby covenant, promise and agree to and with the said parties of the second part and the successors of them, and their and his successor and successors in the trust hereby created, that the said party of the first part, its successors and assigns, shall and will well and truly pay or cause to be paid unto the holder or holders of said bonds, the principal and interest thereof as the same shall become payable according to the tenor of said bonds and the terms of the coupons hereto annexed, but it is expressly understood and agreed that the stock-holders shall not be individually liable for the payment thereof. And that the said party of the first part, its successors and assigns shall and will, from time to time, and at all times hereafter, and as often as hereunto requested by the trustees under this indenture execute, acknowledge and deliver all such further deeds, conveyances and assurances in the law for the better assuring unto the said parties of the second part, and their successors in said trust, upon the trusts herein expressed the railroad equipments, appurtenances, franchises, property and things hereinbefore mentioned, and particularly any and all property, rights and franchises whatsoever which shall or may at any time
44 hereafter while the said bonds or any of them remain unpaid be acquired by the said party of the first part, its successors or assigns as by the said trustees or by their counsel learned in the law shall be reasonably advised, devised or required. In witness whereof the said party of the first part has caused its corporate seal to be hereto affixed and the same to be attested by the signatures of the President and Secretary, and the said parties of the second part have hereunto respectively set their hands and seals to evidence their acceptance to the trusts hereby created, the day and year first above written.

THE MANSFIELD, COLDWATER AND LAKE MICHIGAN RAILROAD COMPANY,
By WILLIARD S. HICKOX, *President.*

Sealed and delivered in the presence of—
GEO. A. CLUGSTON,
JOS. S. HEDGES.

Attest:

——— ———.

——— ———.

We do hereby accept the within trust.
Witness our hands and seals the first day of October, A. D. 1871.

EXHIBIT "B."

This indenture, made the First day of October, in the year of our Lord one thousand eight hundred and seventy-two, between The Mansfield, Coldwater and Lake Michigan Railroad Company, of the States of Ohio and Michigan, respectively, hereinafter called the Company of the first part, and Thomas A. Scott, of the city of Philadelphia, in the State of Pennsylvania, and George W. Cass, of the city of Pittsburg, in the same State, which said Thomas A. Scott and George W. Cass and the persons who shall as hereinafter mentioned succeed them in the office of trustees hereby entrusted to them, are hereinafter called the trustees of the second part.

WHEREAS, The company is an incorporated company, duly formed and organized under the laws of the States of Ohio and Michigan, respectively, for the purpose of constructing, operating and maintaining a certain railroad, to be constructed from Mansfield, in the said State of Ohio to Allegan in said State of Michigan, by the way of Coldwater in the said last named State, and

WHEREAS, For the purpose of procuring the means necessary to construct and equip the said railroad, the Company, in pursuance of the powers and authorities duly invested in it, did heretofore resolve to issue and offer for sale and negotiation a series of four thousand four hundred and sixty bonds of one thousand dollars gold, or two hundred pounds sterling, each bearing date on the First day of October, A. D. 1871, payable in forty years from date, in gold coin of the United States of America or in British pounds sterling, at the option of the holder and bearing interest at the rate of seven per cent. per annum, payable half-yearly in like gold coin or in pounds sterling, at the option of the holders of the coupons representing the same; and

WHEREAS, The said bonds are all of like tenor and in the form following: "Know all men by these presents, that The Mans-
45 field, Coldwater and Lake Michigan Railroad Company are indebted to John Edgar Thompson, of the State of Pennsylvania, or bearer in the sum of one thousand dollars in gold coin of the United States of America, or two hundred pounds British sterling, which sum the said company promises to pay to the said John Edgar Thompson or the bearer hereof, on the First day of October, in the year one thousand nine hundred and eleven, in gold coin aforesaid, at the agencies of the said company, in the city of New York or London at the option of the holder with interest thereon from the First day of October, one thousand eight hundred and seventy-one, at the rate of seven per cent. per annum, payable semi-annually in the like gold coin at the said agencies on the First days of April and October respectively in each year, upon presentation and surrender of the annexed coupons as they severally become due, without deduction therefrom of any tax which may be payable on account thereof, under any law of the States of Ohio and Michi-

gan or the United States, now existing or hereafter to be enacted, the payment of all such taxes being assumed by said company in addition thereto. And it is hereby expressly declared and agreed that if default shall be made in the payment of any half-yearly installment of interest on this bond when such interest shall become due and be demanded, according to the tenor of any coupon hereto annexed, and if such installment of interest shall remain unpaid and in arrear for the period of six months after presentation and demand of payment of the coupon representing the same, the principal of the bond as well as the principal of each of the bonds of the series of which this bond is one, may be declared and made to become due and payable immediately, in the manner and with the effect provided in the deed of trust or mortgage executed by the said company to secure the payment thereof, which is hereinafter mentioned.

This bond is one of the series of four thousand four hundred and sixty bonds of one thousand dollars or two hundred pounds sterling each numbered respectively from 1 to 4460 inclusively and amounting in the aggregate to four millions four hundred and sixty thousand dollars all of which bonds are of like date, and the payment thereof is equally secured by a certain deed of trust or mortgage bearing even date herewith, duly executed and delivered by said Company to Thomas A. Scott and George W. Cass, both of the State of Pennsylvania, as trustees, which conveys to the said trustees, the railroad of the said Company constructed and to be constructed from Mansfield, in the county of Richland and State of Ohio to Allegan in the county of Allegan and the State of Michigan, being a distance of two hundred and twenty miles more or less together with the equipments and appurtenances belonging to the said railroad Company, and the rights, privileges and franchises hereunto appertaining and which creates a sinking fund for the redemption of the said bonds of one per cent. per annum beginning on the first day of April, one thousand eight hundred and seventy-five, which sinking fund is to be applied by the trustees in the purchase and redemption of the said bonds at their par value. The bonds to be purchased and redeemed each year are to be drawn by lot by the trustees or some one of them or person authorized by them in the month of November of each year, first drawing to take place in No-
46 vember, 1875, at the agency of said Company in the city of New York in the presence of said agent and a Notary Public and a notice of the numbers drawn is to be published and posted at the offices where coupons are paid in London and New York on or before the first of February after the drawing, and on the following first day of April the principal of the bond so drawn shall be payable at the option of the holder at the offices and in the manner aforesaid upon surrender of the bonds so drawn with the matured interest coupons, and after the said first of April, the interest upon bonds so drawn shall cease. This bond shall pass by delivery unless registered on the books of the Company, but after registration of ownership certified hereon by the transfer agent of the Company, no transfer hereof except upon the books of the Company

shall be valid unless the last registration shall have been to bearer and transferability by delivery thereby restored; and this bond shall continue subject to successive registrations and transfers to bearer at the option of the holder, this bond shall not become obligatory upon the Company until the certificate endorsed hereon is signed by the trustees. In witness whereof the said company have caused their corporate seal to be hereunto affixed and the same to be attested by the signature of their President and Secretary, and have also caused the coupons hereto annexed to be signed by their Secretary, this first day of October, one thousand eight hundred and seventy-one.

—— —— *President.*

—— —— *Secretary.*

And whereas each of the said bonds has annexed thereto coupons or interest warrants representing the several semi-annual installments of interest to fall due thereon, which coupons bear the lithographed signature of the Secretary of the said party of the first part and are omitting the date of payment in the form following:

"$35. The Mansfield, Coldwater and Lake Michigan Railroad Company *f* 7, will pay to bearer thirty-five dollars in United States gold coin or seven pounds sterling free of all taxes at the agency of said company in the city of New York or London at the option of the holder on the first day of —— A. D. —, being six months interest due that day on bond No. —.

—— —— *Secretary.*

And whereas the company in order the better to secure the payment of the said bonds did heretofore on the first day of October, A. D. 1871, make, execute and deliver to Thomas A. Scott and George W. Cass the trustees above named an indenture of mortgage bearing date the said first day of October, A. D. 1871, and duly recorded in —, wherein and whereby they granted, conveyed and transferred to the said trustees all the property, rights and franchises of the Company then held or thereafter to be acquired by the Company upon the trusts and for the uses and purposes and subject to the agreements and conditions therein mentioned and set forth as will more particularly and at large appear by reference to said indenture of mortgage. And whereas the Company now propose to issue and offer for sale and negotiation the said bonds as hereinbefore set forth, and in order the better to assure the pur-
47 chasers of said bonds and to facilitate their sale and negotiation, did on the — day of October, A. D. 1872, adopt the following preamble and resolutions:

"Whereas, this Company did heretofore resolve to issue and offer for sale and negotiation a series of four thousand four hundred and sixty bonds of one thousand dollars or two hundred pounds each, bearing date of the first day of October, A. D. 1871, and payable in forty years from date in gold coin of the United States of America, or in British pound sterling, at the option of the holder,

and bearing interest at the rate of seven per centum per annum, payable semi-annually in the like gold coin or pound sterling, at the option of the holders of the coupons representing the same; and whereas, the said bonds have been prepared for issue and have been in part executed. "And whereas, a mortgage dated October 1st, 1871 and duly recorded in Richland, Crawford, Seneca, Hancock, Wood, Henry, Fulton and Williams counties in State of Ohio; Hillsdale, Branch, Calhoun, Kalamazoo, Barry and Allegan counties in Michigan, has been made, executed and delivered by the Company to Thomas A. Scott and George W. Cass, in trust, to secure the payment of the said bonds and the coupons attached thereto. And whereas, it now appears to be expedient, in order to effect the sale and negotiation of said bonds that a new or supplemental mortgage should be made, executed and delivered by the Company as security for said bonds, and that certain of the provisions and covenants of said bonds and mortgage should be modified or amended. "And whereas, the Company desire to effect the sale and negotiation of said bonds and to give to the purchasers and holders thereof the highest and best security within their power. Now therefore, Resolved "1. That the President and Secretary of the Company be and they are hereby authorized, empowered, and directed to make, execute and deliver to Thomas A. Scott and George W. Cass, trustees, an indenture of mortgage granting and conveying and transferring to said trustees all the property, rights and franchises of the Company. "2. That said mortgage shall be similar to the mortgage already executed by the Company, bearing date the first day of August, A. D. 1871, except as to the provisions hereinafter named. "3. That the mortgage to be executed shall provide as follows: "I. That in case of default in the payment of any half yearly installment of interest upon the bonds, when such interest shall become due and be demanded according to the tenor of any coupon thereto annexed for a period of sixty days after such default and demand, then the principal of the bonds may be declared to be and become due immediately in the manner and with the effect provided in the mortgage. "II. That the trustees shall receive all money payable as the price of any portion of the premises granted to them, which shall be released under the powers of the mortgage of October 1st, 1871, or the mortgage to be executed; and such price shall be laid out either by the Company in the purchase of other lands and buildings which shall be conveyed to the trustees upon the trusts of the mortgages, or if no such other lands or buildings are so acquired within one year after the release of the former ones, the net proceeds of the sales of the lands and buildings so released shall be applied in augmentation of the sinking fund created by the
48 mortgages. "III. That the sinking fund provided for in the mortgages shall be accumulative. "IV. That any or all new or other equipments, machinery and implements which may be acquired by the Company for the purposes of the railroad, whether in substitution for others or not, shall become and be immediately upon the acquisition of the same, subject to the lien and operation of the mortgage to be executed without any new con-

veyance or transfer or other act or ceremony whatsoever. "V. If the bond-holders shall fail or omit to appoint a new trustee or trustees in the manner provided in the mortgages, within sixty days after the death, resignation or removal of any trustee, application may be first made by any holder or holders of bonds to the aggregate amount of one hundred thousand dollars in the name and on behalf of all the holders of the bonds or otherwise upon reasonable notice to the Company, its successors or assigns, and to the surviving or continuing trustee if there shall be such, to any Federal Court of the United States of competent jurisdiction in either of the States of Ohio or Michigan; but if no Federal Court in either of said States shall have competent jurisdiction of the subject matter, then the application may be made to any court of competent jurisdiction in either of said states of Ohio and Michigan for the appointment of a new trustee or trustees.

"4. That the mortgage — be executed under these resolutions shall be supplementary, and shall not affect or impair in any respect the lien of the mortgage of October 1st, 1871, but the last named mortgage shall be and remain in full force and virtue; the purpose of the mortgage to be executed being merely to modify in the manner above set out, the duties to be performed by the trustees and to provide a more perfect security for the purchasers and holders of the bonds and coupons for interest annexed thereto.

"5. That the President of the Company be and he is hereby authorized and directed to cause to be printed or stamped upon each bond the following words: "This bond is also issued under and secured by a supplemental mortgage issued by the Mansfield, Coldwater and Lake Michigan Railroad Company to Thomas A. Scott and George W. Cass, trustees, dated the twenty-first day of October, A. D. 1872, and recorded in which mortgage provides among other things, that the sinking fund for the redemption of the bonds of one per centum per annum on the principal of the entire issue shall be accumulative and that "sixty days" shall be substituted for "six months" as the period after which, in case of default in the payment of any coupon after presentation and demand of payment thereof, the principal of this bond as well as the principal of each of the bonds of the series of which this is one, may be declared and made to be and become due and payable immediately in the manner and with the effect provided in the deed of trust or mortgage dated the first day of October, A. D. 1871, and in the supplemental mortgage dated the twenty-first day of October, A. D. 1872, both of which have been duly executed by the Company to secure the payment thereof."

"Now, therefore, this indenture witnesseth as follows: Article I.

The Company in order to secure the payment of said bonds,
49 whether now executed or hereafter to be executed and issued as aforesaid, and without discrimination or preference between said bonds on account of the dates of the actual issue of any thereof, and for and in consideration of the premises and of the sum of one dollar to the Company duly paid by the said Thomas A. Scott and George W. Cass, the receipt whereof is hereby acknowl-

edged, hath granted, bargained and sold and by these presents doth grant, bargain and sell, convey and transfer unto the said Thomas A. Scott and George W. Cass, as joint tenants and not as tenants in common, and unto the survivor of them, his heirs and assigns, all and singular the railroad of the Company, or which it is by law authorized to construct, extending and to be constructed from Mansfield, Richland county in the State of Ohio by way of Coldwater in Branch county in the State of Michigan, to Allegan in Allegan county in the said last named State; and also all the property, rights and franchises whatsoever now held and hereafter to be acquired by the Company, including all the railways, ways, and rights-of-way and all the depot grounds and other lands, and all the tracks, bridges, viaducts, culverts, fence and other structures, and all the depots, stations, station houses, engine houses, car houses, freight houses, wood houses and other buildings, and all machine shops and other shops held or acquired, or which shall be held or acquired for use in connection with the said railroad or in connection with the business thereof, and including also all the locomotives, tenders, passenger, baggage, freight, and other cars, and all the other rolling stock and equipment and the machinery, tools, implements, fuel and materials for constructing, operating, repairing or replacing the said railroad, or the equipments or appurtenances of the said railroad now held or hereafter to be acquired by the Company; and including also all the franchises of the Company connected with or relating to the said railroad or the construction, maintenance or use thereof, together with all the tenements, hereditaments and appurtenances to the said railroad, premises or any part thereof belonging or in any wise appertaining, and the reversion or reversions, remainder or remainders, tolls, incomes, rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the Company of, in and to the same, and every part and parcel thereof, with the appurtenances as fully and completely in all respects and to all intents and purposes as if the said railroad at the date hereof were fully constructed, completed and equipped; and all books of account and vouchers kept and to be kept by the said party of the first part and relating to the said railroad or to the business thereof. To have and to hold to the said railroad, lands and premises, and all the franchises and property hereinbefore described unto the said Thomas A. Scott and George W. Cass as joint tenants and not as tenants in common, and unto the survivor of them, his heirs and assigns forever; but in trust nevertheless for the uses and purposes and with and subject to the powers, agreements and conditions hereinafter mentioned and set forth.

Article 2. Until default shall be made in the payment of interest on said bonds or some of them, or in the payment of the principal of said bonds or of some of them, or in the payment of any contribution to the sinking fund hereinafter provided for the redemption thereof, or in the observance of any other covenants or agreements herein contained on the part and behalf of the Company, its successors or assigns, shall be permitted to remain in

actual possession of the said railroad and premises, and to exercise the franchises and rights relating thereto and to collect, receive and use the tolls, incomes, rents, revenues, issues and profits thereof in any manner which will not impair the lien created by these presents.

Article 3. The Company hereby covenants, promises and agrees to and with the trustees, that it will diligently and faithfully use and apply the net proceeds of the negotiation of said bonds in and to the construction of said railroad; and that so long as it shall remain in possession of said railroad and premises, it will keep the said railroad in good order and safe running conditions, and will from time to time pay and discharge all taxes, assessments, and governmental charges lawfully imposed upon the said railroad and premises or any part thereof, and the lien of which might or could be held to be prior to the lien of these presents, so that the priority of these presents may be duly preserved; and will not do or suffer any matter or thing whatsoever, whereby the lien hereof might or could be impaired until the said bonds and all interest thereon shall be fully paid and satisfied.

Article 4.—If default shall be made in the payment of any half-yearly installment of interest which may accrue upon the said bonds or upon any of them when such interest shall become due and be demanded, and if such interest or any part thereof shall remain unpaid and in arrear for the period of sixty days after demand thereof, according to the tenor of the coupon representing the same, and according to the tenor of said bonds, or in case default shall be made in any payment for the purposes of the sinking fund hereinafter created, or in the performance of the covenants or further assurance hereinafter set forth, or in the payment of any taxes, assessments or other governmental charges which may be lawfully imposed or levied upon the said railroad and premises or any part thereof, and the lien whereof might or could be held prior to the lien of these presents, and if any such default shall continue for the period of six months, or in any case default shall be made in the payment of the principal of said bonds or of any one of them, then, and in any and every such case it shall be lawful for the trustees to exercise the powers contained in articles 5, 6 and 12; and it is hereby expressly provided that the introduction in this article of the words "sixty days after demand thereof, according to the tenor of the coupon representing the same" shall have the same effect in every respect as though incorporated in the said bonds and the said mortgage dated October 1st, A. D. 1871, and they shall be and are hereby substituted for and in lieu of the words "six months after presentation and demand of payment of the coupon representing the same" in the body of said bonds and said mortgage dated October 1st, A. D. 1871, with the same force and effect in every respect as if they had been originally introduced into and written in said bonds and mortgage.

Article 5.—The trustees may in the cases stated in article 4, personally or by attorney or agent, enter into and upon the
51 railroad and premises hereinbefore granted and conveyed or

expressed or intended so to be, and each and every part of the same and thenceforth have, hold, possess and enjoy the said railroad and premises and each and every part thereof and all and singular the rights and franchises hereinbefore granted, and may operate the said railroad by such superintendence, managers, receivers, assistants and servants or other attorneys or agents as the trustees shall deem proper, and may make from time to time all such repairs and replacements, and all such useful alterations, additions and improvements to the said railroads and premises as the trustees shall deem expedient and judicious, and may collect and receive all tolls, fares, freights, rents, revenues, incomes, issues and profits of the said railroad and premises and every part and parcel thereof, and may deduct therefrom all the expenses lawfully incurred in making such entry or otherwise obtaining possession of said premises, as well as any and all expenses of holding, operating and managing the said railroad and premises and conducting the business thereof, and including the cost and expenses of all such repairs, replacements, alterations, additions and improvements as may be made by them as aforesaid, and all payments which may be made or be due for taxes or assessments or other charges or liens prior to the lien of these presents, upon the said railroad and premises or upon any part or parcel thereof, as well as just compensation for their own services, and for the services of such attorneys and counsel as may have been by them employed, and after making such deductions they shall apply all tolls, incomes, rents, revenues, issues and profits of the said railroad and premises which may be received by them as aforesaid, to the payment in the first place of all over-due interest on the said bonds, with interest thereon in the orders in which such interest shall have become due and ratably to the persons holding the bonds and coupons evidencing the right to such interest, and without discrimination or preference between them on account of the time of the actual issue of said bonds; and in the next place to the payment of all interest accruing during such possession of the trustees; and in the next place to the payment of the principal of all such bonds which shall under the provisions of these presents have become due according to the tenor or by a sale under article 5, or by a direction of the trustees under article 12, and if in any six months of such possession after payment of all interest on said bonds, and of the principal of all such bonds which shall have become due as above provided for a surplus of money arising as aforesaid shall remain, the trustees may pay over the same to the company, its successors or assigns, or as any court of competent jurisdiction shall lawfully direct.

Article 6.—The trustees may, in the cases stated by article 4, after entry upon the said premises as aforesaid or without any entry thereon, sell or dispose of, personally or by an attorney or agent, all and singular the railroad and property, rights and franchises hereinbefore granted or conveyed or intended so to be, which shall then be or remain subject to the lien or operation of these presents, which sale shall be made by public auction in the city of Mansfield, Ohio, or at any place in the line of said railroad, or in any of the

counties through which the same may run, or in the city of
52 New York, as the trustees in their own discretion may designate, and at such time as they shall appoint; but preparatory to such sale the trustees shall give public notice of the time and place when and where the same is to be made, by advertisement thereof in two newspapers published in the city of New York, and one newspaper published in the city of London in England, at least three times a week for six successive weeks and by a like advertisement published at least once in each week, for six successive weeks in one newspaper in the county of Richland, in the State of Ohio, and in the county of Allegan, in the State of Michigan.

The trustees may make and deliver to any purchaser or purchasers at such sale a good and sufficient deed, or good and sufficient deeds in the law of the railroad or other property which shall be sold as aforesaid to such purchaser or purchasers and any sale or sales which shall be made as aforesaid shall be a perpetual bar, both in law and in equity, against the company, it successors and assigns, and against any and all persons whomsoever claiming or to claim the railroad or other property so sold, or any part and parcel thereof by, from, through or under the company, its successors and assigns.

The proceeds of such sale after deducting therefrom just allowance for all expenses connected therewith, including attorney and counsel fees as well as any and all advances, expenses and liabilities which may have been made or incurred by the trustees in operating or maintaining the said railroad or in managing the business of the same, while the same shall have been in their possession or in arranging for and completing the sale aforesaid, and also all payments which may have been made by them for taxes or assessments and for charges or liens prior to the lien of these presents (if any such there shall be) on the said railroad and premises or any part thereof as well as just and reasonable compensation for their own services, shall be applied by them to the payment of the principal of such of said bonds as may be at that time outstanding and unpaid, whether or not such principal thereof shall have, by the terms of said bonds previously become due, and of the interest which shall have accrued upon the said principal up to that time, and be unpaid with interest thereon, if the same be overdue, without discrimination or preference as between principal and interest, but ratably as to the aggregate amount of such unpaid principal and accrued and unpaid interest. Upon any sale of the said premises which may be made either by the trustees as aforesaid or by virtue of the judgment or decree of any court of competent jurisdiction rendered in any suit or proceeding for the enforcement or foreclosure of a lien hereby created, the principal of all the bonds aforesaid shall become and immediately be due and payable. The payment for or in respect to the principal and interest under this article shall be made to the persons holding the bonds and coupons evidencing the right of such principal and interest without discrimination or preference between them on account of the actual issue of said bonds. If after payment in full of the principal and

interest of each and all of the said bonds including the interest on over-due coupons a surplus of the same proceeds of sale shall remain in the hands of the trustees, they may pay over the same to the company its successors or assigns or as any court of competent jurisdiction shall lawfully direct.

53 Article 7. The trustees may adjourn such sale in their discretion by announcement made at the time and place appointed for such sale and make the sale at the time and place to which the same shall be adjourned without further notice thereof.

Article 8. The receipts of the trustees who shall make such sale or cause the same to be made shall be a sufficient discharge to the purchaser or purchasers of the property which shall be sold as aforesaid for his or their purchase money, and such purchaser or purchasers their or his heirs, executors or administrators shall not after paying such purchase money, and receiving such receipt be liable to see to the application of such purchase money upon or for the trusts or purposes of these presents, or be in any manner whatsoever answerable for any loss, mis-application or non application of such purchase money or of any part thereof.

Article 9. In case of default as aforesaid the Company shall waive and does hereby waive the benefit of any appraisement, stay or extension, law or laws which now exist or shall hereafter be enacted.

Article 10. At any public sale of the railroad and property hereinbefore conveyed made by virtue of the power hereinbefore granted or by judicial authority for the purpose of enforcing the lien of these presents, the trustees may in their discretion personally or by agent or attorney bid for and if the same be obtainable at the price hereinafter mentioned purchase and acquire the property so offered for sale in behalf of all the holders of the bonds secured by these presents which shall then be outstanding in proportion to the respective interest of such holders in said bonds and the coupons thereto belonging at any price not exceeding for the entire property then held upon the trusts of this indenture the whole amount of said bonds then outstanding with the interest accrued thereon and the expenses of such sale or an amount reasonably proportionate thereto for any part of the said property.

Article 11. The trustees may receive the bonds and over-due coupons aforesaid in payment of the purchase money of any property sold at such sale as being equivalent to so much of the said purchase money as in the judgment of the trustees would be distributable and payable on such bonds and coupons.

Article 12. The trustees may in the cases stated by Article 4, and they shall if required by a majority in interest of the holders of all said bonds then outstanding, declare the principal of such bonds to be and thereupon the same shall become due and payable immediately, notwithstanding that the time limited therein for the payment thereof may not then have elapsed; which declaration shall be made by an instrument in writing duly served on the company, but if such option be exercised by the trustees any declaration made by them may be annulled or reversed by a majority in interest of the holders of said bonds by a vote of such majority in interest of

said bondholders given at a meeting of bondholders convened and held as hereinafter provided and attested by an instrument in writing under the hands of the persons so voting or their agents or attorneys thereunto lawfully authorized.

54 Article 13. No act or omission of the trustees, or of the said bondholders in respect to any default in the payment of interest which may have happened shall be held to exhaust or impair the option hereby granted or to extend to or affect any subsequent default or the rights arising therefrom.

Article 14. On or before the first day of April, in the year one thousand eight hundred and seventy-five, and on or before the first day of April in each and every year thereafter, while the said bonds or any of them remain outstanding, the Company shall pay over to the trustees the sum of one per centum upon the amount of said bonds and also a sum equal to all the interest which would have accrued during the preceeding year on the bonds previously drawn for redemption if they had not been so drawn, and the amount so paid shall be used and applied by the trustees in the redemption of the outstanding bonds as hereinafter mentioned.

Article 15. The trustees shall designate by lot, in accordance with the terms of said bonds, the number of the bonds to be paid in each year according to the amount they shall have for that purpose, and shall give notice of the numbers designated by advertisement in one or more daily newspapers in the city of New York once a week until the date of the next interest payment, and shall post up lists thereof in the offices of the agencies of the Company in New York and London, and on presentation and delivery of any such bonds shall apply the money so received by them to the payment thereof, and all future interest on any of the bonds so designated not presented and delivered on or before the date of the said next interest payment, shall cease from and after such date; and the Company shall be no longer liable for the said interest. The trustees shall without reasonable delay cancel the bonds so redeemed by them and return such bonds to the company. The trustees and the Company shall keep separate registries of all the bonds so redeemed or so designated for redemption, and the registry of the Company shall be at all reasonable times open to the inspection of each of the bondholders and stock-holders of the company and the numbers and amounts of the bonds so redeemed or designated for redemption, shall be recorded by the company in each annual statement made to the stock-holders; and the cancelled bonds, shall on the request of the meeting of the stock-holders be produced and exhibited.

Article 16. In any of the cases mentioned in Article 4, it shall be the duty of trustees to exercise the powers of entry and sale hereinbefore granted, or to take appropriate legal proceedings to enforce the rights of the holders of said bonds upon a requisition to that effect being made upon the trustees signed by holders of at least five hundred thousand dollars in amount of the said bonds and upon a proper indemnification to the trustees against all costs and expenses to be incurred by them in the premises.

Article 17. The trustees shall at all times during the continuance

of the trust hereby created, have full power and authority to be exercised in their or his own discretion and not otherwise, to release and convey to any party who may be designated in writing by the Company, its successors or assigns, to receive the same or to release from the lien and operation of these presents in such manner as they may deem proper, any portion of the lands and buildings heretofore granted, which in the judgment of the trustees shall not be necessary for their use in connection with the railway, and may make and deliver the instruments necessary or proper to carry the same into effect.

Article 18. The trustees shall receive all money payable as the price of any portion of the premises hereby granted, which shall be released under the *the* powers of the preceding article, and such price shall be laid out either in the purchase by the Company of other lands and buildings which shall be conveyed to the trustees, upon the trusts of these presents, or if no such other lands or buildings are so acquired within one year after the release of the former ones, the net proceeds of the sale of the lands and buildings so released shall be applied by the trustees in augmentation of the sinking fund hereinbefore created.

Article 19. The trustees shall have full power to allow the Company, its successors or assigns, from time to time to dispose, according to its or their discretion, of such portion of the equipments, machinery and implements which shall be at any time held or acquired for the use of the said railroad, as shall have become unfit for such use; but any and all new or other equipments, machinery and implements which may be acquired by the company for the purposes of the said railroad, whether in substitution for others or not, shall by virtue and force hereof, become and be immediately upon the acquisition of the same subject to the lien and operation of these presents without any new conveyance or transfer or other act or ceremony whatever.

Article 20. If the Company shall well and truly pay all interest upon said bonds when such interest shall become due, and shall also well and truly pay and discharge the principal of each of the said bonds when the same shall become due according to the tenor of said bonds and the true intent and meaning of these presents, then and thereupon, that is to say, upon the payment of said bonds and all interest thereon all their estate, right, title and interest of the trustees shall cease, determine and become void, otherwise the same shall be and remain in full force and virtue.

Article 21. The trustees shall be entitled to just and reasonable compensation for all services which they may hereafter render in this trust, which compensation shall be paid by the Company or out of the income of the property mortgaged.

Article 22. The trustees shall not be answerable for the default or misconduct of each other or of any agent appointed by them, with reasonable care, or for anything whatsoever in connection with this trust, except wilful misconduct or gross negligence or default.

Article 23. The trustees may be removed by a vote of a majority in interest of the holders of said bonds, cast at a meeting of said

bond-holders duly convened and held and attested by the
56 hands of the chairman and secretary of such meeting, or such removal may be made by a majority in interest of said bond-holders by an instrument in writing under their hands duly acknowledged.

Article 24. Either of the trustees may resign and discharge himself of the trust created by these presents by giving notice in writing to the Company and the other trustees, if there be such, at least three months before such resignation shall take effect, unless shorter notice be accepted in writing by the Company and such co-trustees, if there be such, and upon the due execution of the conveyance hereinafter required.

Article 25. In case at any time hereafter the trustees, or either of them, shall die, or resign, or be removed, or become incapable or unfit to act in the said trust, the holders of the bonds secured hereby, acting by a majority in interest, shall be and they are hereby authorized and empowered by an instrument or instruments in writing under their own respective hands, or by a vote of a meeting of such bond-holders duly convened and attested as aforesaid to appoint a successor or successors, who when so appointed shall immediately upon his or their acceptance of the trust, become vested with all the powers and authorities and estates held or possessed by the trustees or trustee to succeed whom he or they shall have been appointed without any further assurance or conveyance; and thereupon all the powers and authorities hereunder and all the estate, right, title and interest in the said premises of such resigned or removed trustee shall wholly cease and determine; but nevertheless the surviving or continuing trustee if there be such, and the trustee or trustees resigning or being removed as aforesaid, shall upon the request in writing of the new trustees or trustee execute and deliver to them or him, all such conveyances and other instruments as shall be fit and expedient for the purpose of securing to such new trustees or trustee the legal estate in the premises.

Article 26. If the bondholders shall fail or omit to appoint a new trustee or new trustees in the manner aforesaid within sixty days after such death, resignation or removal of any trustee, application may first be made by any holder or holders of said bonds to the aggregate amount of one hundred thousand dollars, in the name and on the behalf of all the holders of said bonds or otherwise upon reasonable notice to the Company, its successors or assigns and to the surviving or continuing trustee, if there shall be such, to any Federal Court of the United States of competent jurisdiction in either of the States of Ohio or Michigan for the appointment of a new trustee or trustees. But, if no Federal Court in either of said States shall have jurisdiction of the subject matter, then the application may be made to any Court of a competent jurisdiction in either of said States of Ohio and Michigan for the appointment of such new trustee or trustees.

Article 27. Whenever any contingence shall arise in which the action of a majority in interest of the holders of said bonds shall be necessary or in which the said bond-holders are herein declared

to have any discretionary voice or power, it shall be the duty of the trustees, and they or either of them are hereby authorized and required to call a meeting of all the holders of bonds secured
57 hereby, to be held in the city of New York. Such meeting shall be called by advertisement (the expense whereof shall be a liability of the Company and may be defrayed if necessary, from any trust fund) to be published three times in each week for six weeks in two newspapers of good circulation among the business community in that city, one newspaper in the city of Mansfield, Ohio, and one newspaper in the city of London, and in default of such meeting being called by the trustees or either of them, within thirty days after notification in writing to them by any bond-holder of the necessity therefor, it shall be competent for any holder or holders of said bonds to the aggregate amount of one hundred thousand dollars to call said meeting in the manner aforesaid; and at such meeting so convened the holders of said bonds shall be competent to exercise in person or by proxy all the powers and authorities conferred upon them by these presents.

Article 28. Nothing hereinbefore contained shall be held to require the trustees to expend any of their personal moneys, or to incur any personal liability in the calling or holding of said meeting and at any meeting called as aforesaid, a majority in interest of the holders of said bonds may prescribe and establish such rules as they may deem proper for the calling of future similar meetings and the regulation of the proceedings thereof.

Article 29. The Company for the consideration aforesaid has promised and agreed and does hereby promise, covenant and agree to and with the trustees, that the Company, its successors and assigns, shall and will well and truly pay or cause to be paid unto the holder or holders of said bonds the principal and interest thereof as the same shall become payable, according to the tenor of said bonds and of the coupons thereto annexed and the terms and conditions of these presents; but it is expressly understood and agreed, that the stockholders shall not be individually liable for the payment thereof beyond the amount, if any, for the time being not paid up on their shares; and the Company, its successors and assigns, will from time to time and at all times hereafter, and as often as hereunto requested by the trustees, execute, deliver and acknowledge all such further deeds, conveyances and assurances in the law, for the better assuring unto the trustees upon the trusts herein expressed, the railroad equipments, appurtenances, franchises, property and things hereinbefore mentioned and particularly any and all property, rights and franchises whatsoever, which shall or may — any time hereafter, while the said bonds or any of them remain unpaid be acquired by the Company, its successors and assigns as by the trustees or by their counsel learned in the law, shall be reasonably advised, devised or required.

Article 30.—All the powers and authorities hereby given to the trustees shall in case of there being only one trustee, be exercised by him alone.

Article 31.—The holders of said bonds, coupons, and the trustees

shall have all the rights, powers and authority, and be subject to all the restrictions and conditions provided in the said bonds and mortgage dated October 1st, A. D. 1871, except as modified by this
58 deed of trust or mortgage, and if proceedings at law, in equity or otherwise should at any time be instituted, by either or any of them, they shall proceed under and be governed by the terms and provisions of said bonds and mortgage dated October 1st, 1871, as modified by this mortgage in the same manner and with the same effect as though the mortgage of October 1st, A. D. 1871, and this mortgage were in fact but one instrument of writing. Wherever the terms of this mortgage differ from those of the mortgage of October 1st, A. D. 1871, the provisions hereof shall control as to the rights and powers and restrictions and conditions provided, conferred or imposed upon the holders of the bonds and coupons, the trustees, and the company. In witness whereof the company has caused its corporate seal to be hereto affixed, and the same to be attested by the signature of the President and Secretary, and the said Thomas A. Scott and George W. Cass have hereunto respectively set their hands and seals to evidence their acceptance of the trusts hereby created, the day and year first above written.

Sealed and delivered in the presence of Geo. A. Clugston, Joseph Hedges.

Attest: { WILLARD S. HICKOX, *President*,
HENRY C. HEDGES, *Secretary*.

THOMAS A. SCOTT,
G. W. CASS, } *Trustees*.

STATE OF OHIO,
County of Richland, } *ss*:

Be it remembered that on the 5th day of October, Anno Domini, 1872, before me, George A. Clugston, a Notary Public of the State of Ohio, within and for the said county, personally appeared Willard S. Hickox, President of the Mansfield, Coldwater and Lake Michigan Railroad Company, and being duly sworn deposes and says: That he was personally present at the execution of the above-written indenture or mortgage, and saw the common seal of the said corporation duly affixed thereto, and that the seal so affixed thereto is the common and corporate seal of the said corporation, and that the above-written indenture was duly signed, sealed and delivered by and as, and for the act and deed of said company, for the uses and purposes therein mentioned, and that the name of this deponent subscribed to the said indenture as President of said company, in attestation of the due execution and delivery of the said indenture, is of this deponent's own proper and respective hand-writing. Willard S. Hickox, sworn and subscribed the day and year aforesaid, before me, George A. Clugston, Notary Public, Richland County, Ohio.

STATE OF OHIO, } *ss:*
County of Richland, }

I, George B. Harmon, Clerk of the Court of Common Pleas, within and for the county of Richland and State of Ohio, do hereby certify that George A. Clugston, Esquire, before whom the foregoing and annexed mortgage was taken and acknowledged, was at the time of taking the same a Notary Public, in and for said county, duly commissioned and sworn to all whose official acts as such,
59 full faith and credit are due; and that the foregoing signature purported to be his is genuine, as I believe; and that the said instrument is executed and acknowledged in conformance to the laws of the State of Ohio. In witness whereof I have hereunto subscribed my name and affixed the seal of said court, at the city of Mansfield, this 9th day of October, A. D. 1872.

GEORGE B. HARMON, *Clerk.*

And afterwards, to-wit: On the 20th day of January, A. D. 1876, there was issued by the Clerk of said court, a certain subpœna which is in the words and figures following, to-wit:

Subpœna.

THE UNITED STATES OF AMERICA, } *ss:*
Northern District of Ohio, }

The President of the United States of America to the Marshal of the Northern District of Ohio, Greeting: You are hereby commanded to summon the Mansfield, Coldwater and Lake Michigan Railroad Company, if it shall be found in your district, to be and appear in the Circuit Court of the United States for the Northern District of Ohio aforesaid, at Cleveland, on the first Monday in March next, to answer a certain Bill of Chancery, filed and exhibited in said Court against it by Thomas A. Scott and George W. Cass. Hereof it is not to fail under penalty of the law hence ensuing, and have you then and there this writ.

Witnesseth the Honorable Morrison R. Waite, Chief Justice of the United States, this 20th day of January, A. D. 1876, and in the 100th year of the Independence of the United States of America.

EARL BILL, *Clerk.*

Memorandum.—The said defendant is required to enter its appearance in this suit in the Clerk's office of said Court, on or before the first Monday of March, 1876, otherwise the said bill may be taken *pro confesso.*

EARL BILL, *Clerk.*

Return. And afterwards to-wit: On the 28th day of January, A. D. 1876, said writ was returned to said Clerk's office by the Marshal endorsed as follows, to-wit: Northern District of Ohio, *ss:* On the 24th day of January, A. D. 1876, I made due service of this writ by delivery of a true and duly certified copy thereof, to each of the following persons, officers of the said The

Mansfield, Coldwater and Lake Michigan Railroad Company, to-wit: To Henry C. Hedges, President of said company at Toledo, Ohio. To Joseph Hedges, Secretary of said company at Mansfield, Ohio. To S. B. Sturges, Treasurer of said company at Toledo, Ohio. To William Sheffield, Director of said company at Toledo, Ohio, and by leaving a true and duly certified copy thereof at the office of said company at Mansfield, Ohio.

N. B. PRENTICE,
U. S. Marshal.

60 Appearance entered.

And afterwards, to-wit: On the 1st day of March, A. D. 1876, came the defendant by its attorney and filed in said Clerk's office the following entry of appearance, to-wit:

In the Circuit Court of the United States for the Northern District of Ohio.

THOMAS A. SCOTT and GEORGE W. CASS
vs.
THE MANSFIELD, COLDWATER AND LAKE MICHIGAN RAILROAD COMPANY.

The defendant above named comes and enters its appearance in said court in the above entitled action. By C. H. Scribner of Counsel for said defendant. And afterwards, to-wit:

Continued.

At the January term, A. D. 1876, of said Court, this cause was continued. And afterward, to-wit: On the 17th day of April, A. D. 1876, came the said defendant by its solicitors and filed in said Clerk's office its answer

Answer.

which is in the words and figures following to-wit: In the Circuit Court of the United States for the Northern District of Ohio, Thomas A. Scott and George W. Cass *vs.* The Mansfield, Coldwater and Lake Michigan Railroad Company. Answer. The answer of Mansfield, Coldwater and Lake Michigan Railroad Company the defendant to the bill of complaint of Thomas A. Scott and George W. Cass complainants.

This defendant now and at all times hereafter, *owing* to itself all and all manner of advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained for answer thereto, or to so much thereof as this defendant is advised it is necessary or material for it to make answer to answering, saith. I. Defendant denies that on the 1st day of June, A. D. 1871, it became a railroad corporation duly and legally incorporated and organized as a railroad corporation of the States of Ohio and Michigan, on the contrary defendant avers that said incorporation and organization was not perfected and completed until January 6th, 1873, nor did defendant become a railroad corporation nor was it invested with the powers and privileges of a railroad corporation of said States until the date last aforesaid; nor was it authorized to locate, establish or commence the construction of its line of railroad until the date last aforesaid.

II. Defendant denies that on the first day of October, 1871, or at any other time it executed and delivered to the complainants the deed of trust or mortgage in the bill of complaint mentioned and set forth or any other conveyance of the rights and property in the bill of complaint mentioned, or that defendant was desirous of obtaining money upon its bonds, or that defendant ever executed and delivered any bonds, or that prior to January 6th, 1873, — possessed any power or authority to execute and deliver its bonds or any power or authority to execute or deliver a deed of trust or mortgage upon any property whatsoever. Defendant denies that said alleged deed of trust or mortgage was the proper and lawful act of the defendant; or that the same was authorized, executed and delivered by said company in conformity with law, or in pursuance of the powers vested in it by law or that it became and was a valid conveyance for the purposes in the bill of complaint mentioned or for any purpose.

61 III.—Defendant denies that on or about the 1st day of October, 1872 or at any other time it made, executed and delivered to complainants its supplemental deed of trust or mortgage or any other conveyance of the rights and property in the bill of complaint mentioned; or that it could in pursuance of law or the powers vested in it by law have executed and delivered a deed of trust or mortgage of or upon any of the rights or property in the bill of complaint mentioned. Defendant denies that at the date mentioned in said bill of complaint or at any other time it desired to effect a sale of or to negotiate its bonds or to create or provide any security therefor.

Defendant denies that said alleged supplemental deed of trust was the proper act of defendant; or that the same was executed and delivered by defendant in conformity with law or in pursuance of the powers vested in it by law, or that it became or was a valid conveyance for the purposes in the bill of complaint mentioned, or for any purpose whatsoever, or that defendant possessed any power or authority, legal or otherwise to execute the alleged supplemental trust, deed or mortgage in the bill of complaint set forth.

IV.—Defendant denies that it at any time issued or sold its bonds to the amount of sixteen hundred thousand dollars or to and amount whatever, or that the same are now outstanding in the hands of *bona fide* and lawful owners thereof, or that any interest has accrued thereon, or is now due and payable thereon, or is to become due and payable thereon. Defendant further denies that on the 19th day of October, 1874, or at any other time the owners and holders of any of the coupons of the bonds of defendant by their proper agent or otherwise presented such coupons for payment at the office of the defendant in Mansfield or elsewhere.

V.—Defendant denies that said original and supplemental deeds of trust are liens upon the railway and property of defendant or upon any part thereof.

VI.—Defendant denies that complainants were ever requested in writing or otherwise by any holders of bonds of the defendant to declare the principal of any bonds of the defendant due and pay-

able immediately, or that complainants possessed any power or authority to make such declaration or that such declaration was at any time lawfully made, or that the principal of any bonds of the defendant has become due and payable.

VII.—Defendant denies that it has a large floating debt, or that its floating debt amounts to one hundred and fifty thousand dollars, or that it is insolvent.

VIII.—Defendant further answering says: That on the 28th day of December, 1870, the directors of said Mansfield, Coldwater and Lake Michigan Railway Company, a corporation of the State of Ohio, and the directors of said Ohio and Michigan Railroad Company, a corporation of the State of Michigan, entered into an agreement under the corporate seals of said companies for the consolidation of the capital stock of said companies so as to form one consolidated company under the name of the Mansfield, Coldwater and Lake Michigan Railroad Company, and thereby to create
62 and establish the defendant company; that said agreement of consolidation was on the 13th day of April, 1871, at a special meeting called for that purpose, approved by more than two-thirds majority of the votes of all the stock-holders of said Mansfield, Coldwater and Lake Michigan Railroad Company; and on the 9th day of May, 1871, at a special meeting called for that purpose, it was in like manner approved by more than two-thirds majority of the votes of all the stock-holders of the said Ohio and Michigan Railroad Company, that the ratifications of said agreement of consolidation of said companies were exchanged on the 10th of May, 1871; that said agreement of consolidation together with the record of the action therein by the stock-holders of the respective companies, certified by the secretaries thereof, was filed in the office of the Secretary of State of Ohio, on the 1st day of June, 1871; but no election of directors of said consolidated company was had after filing said certificate with said Secretary of State as aforesaid, until January 6th, 1873, at which date a Board of Directors of said consolidated corporation was elected. And defendant avers that until the election of said Board of Directors as aforesaid, said consolidated corporation being defendant company did not succeed to the rights, powers and franchises of said original corporations, nor was its organization and incorporation perfected and completed until said election, nor until said date was it invested with power or authority to make contracts and incur liabilities, nor had it any offices or agents, or any means or instrumentalities, whereby it might act as a corporate body or otherwise, defendant further answering says: That on the 20th day of July, 1871, one Willard S. Hickox, assuming to act on behalf of this defendant and to be the President thereof, entered into what purports to be the contract with the Pennsylvania Company, a corporation of the State of Pennsylvania, the complainant, Thomas A. Scott then was and still is the President of said Pennsylvania Company and acted in said transaction in the main and behalf of said Pennsylvania Company, he having been first duly authorized thereunto by said Company, a copy of the paper writing so executed by the Pennsylvania

Company and by said Hickox assuming to act as aforesaid is hereunto annexed, marked "A" and made part of this answer. And defendant avers that therein and thereby the said Pennsylvania Company among other things agreed and bound themselves, their successors and assigns to provide iron chairs and spikes to ballast and lay the track and sidings over and upon the line of railroad of defendant, to fence the same, to build depots, station houses, waterhouses and all other buildings, to place said road in first class condition for traffic, and specially build at Mansfield, Ohio, suitable machines and workshops for said railroad, said shops to be of such capacity and size as would accommodate the business and necessities of the said road, to build at Coldwater, Michigan, such other shops as would accommodate the business and necessities of the road within two years from the date thereof. And said Pennsylvania Company further agreed and bound itself to equip and work the whole line aforesaid as a first-class railroad and to maintain the same. The said Willard S. Hickox assuming to act in the name and behalf of defendant as aforesaid, undertook among other things, that preferred stock of defendant company should be issued to the
63 amount of the actual expenditure at cash values made by said Pennsylvania Company in doing the work aforesaid and in obtaining the right of way and grounds therein mentioned; said stock to be entitled to dividends equal to seven per cent. out of the net earnings of said road and to be the only stock issued except common stock as therein provided to be issued to said Pennsylvania Company, the actual expenses of managing, maintaining and operating said road-paying interest on its bonds and providing a sinking fund being first deducted in calculating said net earnings. Said Hickox assuming to act as aforesaid, further undertook, among other things, that defendant should deliver to said Pennsylvania Company, bonds and common stock of defendant company as therein mentioned, in consideration of completing said road ready for trains, the bonds to be dated August 1st. 1871, to the amount of twenty thousand dollars on each mile of track laid of the line of said road from the center of the north-east quarter of section number 3, in Springfield township, Richmond county, Ohio, west to the western terminus of said road at Allegan, Michigan, the principal thereof to be payable in forty years after date, in gold in the city of New York, and bear interest at the rate of seven per centum per annum, payable in gold in said city of New York, said interest to be payable semi-annually on the first days of February and August. Said Hickox assuming to act as aforesaid also undertook that said bonds and the interest thereon and a proper sinking fund for their redemption should be secured by the lien of a first mortgage upon the entire railroad of defendant, extending from Mansfield to Allegan aforesaid, and also upon the income, franchises, cars and equipment of defendant.

Said Hickox assuming to act as aforesaid also undertook that defendant should deliver to said Pennsylvania Company as part of the consideration to be paid said Pennsylvania Company an amount of the common stock of defendant, five thousand dollars greater than the whole amount of stock issued for all other purposes, said

bonds and stock to be delivered to complainants as trustees for delivery to said Pennsylvania Company as fast as material should be delivered by said Pennsylvania Company to the value thereof, and in full as each ten miles of iron should be laid and the track in condition for the passage of trains.

And the said Pennsylvania Company acting by its President, the said Thomas A. Scott as aforesaid, and the said Willard S. Hickox assuming to act for defendant as aforesaid, further undertook that the net earnings of the entire line of said railroad, after paying the expenses of management, maintainance, and operating as aforesaid, should be directed to paying: First. The interest on said hereinbefore mentioned bonds and sinking fund, and certain monthly payments to the Pittsburgh, Fort Wayne and Chicago Railway Company, or its lessees in said writing mentioned.

Second—Dividends on the preferred stock.

Third—Dividends on the common stock, the common stock to receive no dividends until the preferred stock had been paid its dividends out of the earnings equal to 7 per cent. out of the proceeds in any year, and such net earnings would justify dividends being made.

64 Defendant further answering says: That on the 2nd day of October, 1871, the said Pennsylvania Company, acting by its President, the said Thomas A. Scott, and the said Willard S. Hickox assuming to act for the defendant, entered into what purports to be a traffic contract between said companies. Defendant attaches a true copy thereof marked "B," and makes the same a part of this answer; and defendants here refer to the same for the particular terms thereof.

Defendant further says that the alleged trust, deed or mortgage in the bill of complaint mentioned, and the alleged supplemental trust deed or mortgage in the bill of complaint mentioned, and the bonds in the bill of complaint mentioned, were all executed by the said Willard S. Hickox, he assuming at the time of so executing the same, to be President of the defendant company, and the same trust deed or mortgage, and the said bonds therein and in the said alleged supplemental trust deed or mortgage described, are the same trust deed or mortgage and the same bonds mentioned and provided for in said agreement between said Pennsylvania Company and said Hickox, of July 20th, 1871, hereinbefore referred to, and none other.

Defendant further answering says: That on the 4th day of May, 1872, the said complainant, Thomas A. Scott, then the President of said Pennsylvania Company, as aforesaid, and acting as one of said trustees, procured and induced the said Willard S. Hickox to deliver to him all the bonds so executed by said Hickox in the name of defendant as aforesaid; there were 4,460 of the bonds so delivered, numbered from 1 to 4,460 consecutively, for $1,000 or £200 each, dated October 1, 1871, with interest coupons attached (the coupons maturing April 1, 1872, having been cancelled and cut off). In consideration of the delivery of said bonds as aforesaid, and simultaneously therewith as a part of said transaction, the said Pennsyl-

vania Company by its President, the said Thomas A. Scott, executed and delivered to the said Hickox, for the benefit of defendant, a written undertaking, bearing date May 4, 1872, wherein it was recited that said Hickox had delivered to complainant as said trustee, the bonds above described under said supposed contract of July 20, 1871, by the terms of which said bonds were to be delivered to said Pennsylvania Company at the rate of twenty thousand dollars per mile, as fast as material should be delivered to the value thereof, and in full as each ten miles of iron should be laid, and the track in condition for the passage of trains; after which recital it was stipulated and agreed by said Pennsylvania Company, in and by said last mentioned agreement, that in consideration of the delivery of all of said bonds as aforesaid, before said iron was laid, the said Pennsylvania Company obligated itself to take care of and pay all interest which might become due thereon prior to the said line of railway of defendant being in condition for traffic; and it was provided that for all interest so paid for the Pennsylvania Company, and not justly and equitably charg-able thereto, under said contract of July 20, 1871, said Pennsylvania Company should be reimbursed out of the earnings of defendant's road, after the same should be completed in sections under said contract and begin to make earnings on the respective sections, as required by the terms of said agreement. Defendant further says that at the date
65 of the execution by him of said alleged trust deed or mortgage, and of the execution by him of said supplemental trust deed or mortgage, and of the execution and delivery by him of the said bonds as aforesaid, and of the execution by him of the said supposed contracts of July 20, 1871, and of October 2, 1871, the said Willard S. Hickox was not President of defendant company, nor had he any power or authority to execute the same, and the same are of no binding obligation upon defendant.

And the defendant further says: That the said bonds were obtained by the said complainant, Scott, as aforesaid, in the name of said trustees, for and on behalf of said Pennsylvania Company; that at said date of said delivery thereof the said Pennsylvania Company was entitled to no part thereof; the said bonds are now held by said Pennsylvania Company under said supposed contract of July 20, 1871, that if any said bonds are held by other parties, they are held in the interest of and for said Pennsylvania Company, none of said bonds are held by *bona fide* owners, but the pretended holders and owners thereof, have and are chargeable with notice of all the matters herein set forth, and of all the equities of defendant arising therefrom.

Defendant further says that about said May 4, 1872, the said Pennsylvania Company wrongfully obtained one million five hundred thousand dollars of the stocks in defendants company being more than a majority thereof, claiming at the time to be entitled thereto under said supposed contract of July 20, 1871, and claiming to be such stockholders, the said Pennsylvania Company have ever since managed and controlled, and still manage and control the affairs of

defendant company, and they thereby secured a majority of members upon its first board of directors elected in January, 1873, in the interest of said Pennsylvania Company. That said stock was issued without lawful authority and is of no binding force or effect. That when it so obtained said bonds and stock said Pennsylvania Company had in no way complied with any part of its undertakings hereinbefore mentioned, nor had it earned the same, or any part of the consideration, so in advance received by it for completing and equipping said road, and whatever defaults may have since occurred in any of the matters nominally attempted to be devolved upon defendant to perform by said Hickox as aforesaid are in fact the wrong and default of said Pennsylvania Company, who are the real parties in interest in said alleged bonds and mortgages, and at whose instance and for whose benefit this suit is now prosecuted. Defendant avers that said Pennsylvania Company entirely failed to perform upon their part their said undertaking of July 20, 1871, they pretended to place the iron and rails upon about seventy-five miles of the line of said railway, and put about forty-seven miles of it in condition for the passage of trains; but the same is insufficiently and improperly done and not according to the terms of their said undertaking; they have not made it a first-class road, it is short of ballast, the iron furnished and laid down is of inferior quality, the sidings are insufficient, they have not fenced said road, nor erected proper buildings, the cars and rolling stock furnished are of unsuitable and of inferior character and quality in consequence of which the earnings are light, and no proper or sufficient account has ever been rendered of the earnings made by said Pennsylvania
66 Company upon said road, said company has entirely failed to iron and complete the balance of said line of road or to maintain and operate the same. The cost of the work done by them has not exceeded seven thousand dollars per mile. They have never earned the stock wrongfully delivered to them as aforesaid, nor have they entitled themselves to any interest upon the bonds delivered to them by said Hickox as aforesaid.

Defendant further answering avers that complainants in prosecuting this proceeding are moved by and are acting in the interest of said Pennsylvania Company, that their object and purpose are to annihilate and destroy so much of the road of defendant as lies west of Tiffin in the county of Seneca, in said State of Ohio, and to sink and destroy its stock; that the interests of said trustees and of said Pennsylvania Company and of the holders of said bonds are one and identical; that by the terms of said agreement of said Pennsylvania Company of May 4, 1872, said Company are bound to pay the interest alleged to have matured upon said bonds, and the subsequently accruing interest thereon until the full completion of said road by said Pennsylvania Company under its agreement of July 20, 1871; that the complainant, Scott, who acted for said Company in making said contracts, controls and directs the action of said trustees in this suit and proceeding and controls and directs the affairs of said Pennsylvania Company, and the holders of said

bonds and defendant having fully answered prays to be hence dismissed with his costs in this behalf expended.

JOHN B. SHIPMAM,
HENRY C. HEDGES, AND
C. H. SCRIBNER,
Solicitors for Defendants.

UNITED STATES OF AMERICA, } ss:
Northern District of Ohio, }

I, Joseph S. Hedges, being duly sworn depose and say that I am assistant Secretary of the defendant and that all the matters and things which are stated in the foregoing answer as from the information of others I believe to be true, and that all the said other matters and things therein set forth are true in substance and in fact.

JOSEPH S. HEDGES.

Sworn to before me and subscribed in my presence May 20, 1876.
HENRY C. HEDGES,
U. S. Court, Northern District of Ohio, Circuit Court of U. S.

Motion.

And afterward to-wit: On the 5th day of May, A. D. 1876, came the complainants by their solicitors and filed in said Clerk's office a certain motion which is in the words and figures following to-wit: In the United States Circuit Court for the Northern District of Ohio, Thomas A. Scott and George W. Cass *vs.* Mansfield, Coldwater and Lake Michigan Railroad Company. Now come complainants and move the court to strike from the files the answer filed herein by defendants for the reason that the same is not verified.

R. R. RANNEY & J. T. BROOKS,
Att'ys for Complainants.

Replication.

And afterwards to-wit: On the 26th day of May, A. D. 1876, came the complainants by their solicitors and filed in said Clerk's office the following replication to-wit: Thomas A. Scott and George W. Cass *vs.* Mansfield, Coldwater and Lake Michigan Railroad Company.

67 Replication.

In Chancery.—The replication of Thomas A. Scott and George W. Cass, complainants to the answer of the Mansfield, Coldwater and Lake Michigan Railroad Company. These repliants, saving and reserving to themselves all and all manner of advantage of *acception* to the manifold insufficiencies of the said answer for replication thereunto saith: That they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by these repliants. Without this, that any other matter or thing whatsoever in the said answer, contained material or effectual in the law to be replied unto, confessed and avoided, traversed and denied, is true. All which matters and things these rep-

liants are, and will be, ready to aver and prove, as this Honorable Court shall direct, and pray as in and by their said bill they have already prayed.

R. R. RANNEY AND J. T. BROOKS,
Solicitors for Complainants.

Motion of Swan, Rose & Co.

And afterwards, to-wit:—On the 20th day of June, A. D. 1876, came Swan, Rose & Company, by their solicitors, and filed in said clerk's office the following motion, to-wit: In the United States Circuit Court for the Northern District of Ohio. Thomas A. Scott and George W. Cass, Plaintiffs, *vs.* The Mansfield, Coldwater and Lake Michigan Railroad Company, Defendants. Motion. Now comes the co-partnership of Swan, Rose & Co., and move the Court for an order allowing them to be made parties defendant in this cause, in addition to the parties already named, and giving them leave to answer herein by a day to be fixed. The ground of this motion is that said Swan, Rose & Co., are, and at the time of the commencement of this action were, judgment creditors of the defendant, the Mansfield, Coldwater and Lake Michigan Railroad Company, holding by virtue of the laws of Ohio, a valid and subsisting lein upon the property of said defendant, which is sought to be subjected to sale in this action. They say that they recovered the judgments which they hold against said defendant, for the unpaid balance due them for building defendant's railway, and that the same are of record in the Court of Common Pleas of Fulton County, Ohio.

OTIS, ADAMS & RUSSELL,
Attorneys for Swan, Rose & Co.

And afterward, to-wit: At the April term, A. D. 1876, to-wit: On the 19th day of August, A. D. 1876, came the parties by their counsel, and the cause came on to be heard upon the motion heretofore filed herein by complainants, for an order relative to the removal and relaying of certain ties and iron, between Montieth and Coldwater on the line of the said Mansfield, Coldwater and Lake Michigan Railroad, in the State of Michigan, and it appearing to the Court that the defendant, by its counsel, has waived service of the notice of the filing and the hearing of the said motion, and has filed its consent in writing that said motion be granted, and an order entered as therein asked for. And it further appearing to the Court that the Pennsylvania Railroad Company being the owner and holder of all the bonds of said Mansfield, Coldwater and Lake Michigan Railroad Company, has also filed herein its written
68 consent that said motion be granted. And it also further appearing that the interests of said Mansfield, Coldwater and Lake Michigan Railroad Company, as well as of said Pennsylvania Railroad Company, as the owner of said bonds, will be promoted by the removal of said ties and rails and the re-laying the same as described in said motion. It is therefore ordered and decreed by the Court that said motion be and the same is hereby sustained. And

it is further ordered and decreed that the complainants herein be permitted to enter into such arrangements with the said Coldwater, Marshall and Mackinaw Railroad Company, as may be agreed upon between themselves relative to the taking up, removing and relaying by the last named company the ties and rails that are now laid and unused on said Mansfield, Coldwater and Lake Michigan Railroad, southeast of, and for a distance of about eight miles from Montieth, and after the same have been relaid on the graded line of said Mansfield, Coldwater and Lake Michigan Railroad, near Coldwater, the said Coldwater, Marshall and Mackinaw R. R. Co. may use so much of said line as is covered by said ties and rails for such time and upon such terms and conditions as may be agreed upon between said last named company and the complainants, provided that before any such arrangement shall be finally consum-ated, said Coldwater, Marshall and Mackinaw R. R. Co. shall execute and deliver to said complainants a bond with approved sureties, for not less than the sum of one hundred thousand dollars, conditioned that all the covenants on the part of said Coldwater, Marshall and Mackinaw R. R. Co. in respect to the taking up and relaying said ties and rails between Montieth and Coldwater, as well as in respect to the subsequent use of that part of said M. C. & L. M. R. R. Co., whenever said ties and iron shall be relaid, shall be fully and faithfully performed by said Coldwater, Marshall and Mackinaw R. R. Co.

It is further ordered that nothing in this decree nor in the agreements that may be made in pursuance hereof, shall give said Coldwater, Marshall and Mackinaw R. R. Co. any rights whatever in relation to the removal of said ties and iron, nor to the use of said railroad whenever the same shall be laid after the termination of this case; nor beyond the time when said Mansfield, Coldwater and Lake Michigan Railroad Co. may be sold under and pursuant to any other or further order that may be made by the court herein. It is also further ordered that nothing in this decree nor in the arrangements that may be hereafter made between the complainants and said Coldwater, Marshall and Mackinaw R. R. Co., shall in any way interfere with the rights or remedies of the owners of the bonds of said M. C. & L. M. R. R. Co., nor of the trustees, complainants herein, either in this or any other proceeding that may be brought to enforce the rights of said bond-holders or of said trustees, nor in any way to hinder or delay the further proceedings in this case; and afterward to wit:

Continued.

At said April term A. D. 1876, of said court this cause was continued, and afterward to wit: at the October term of said court to-wit: on the seventh day of October, A. D. 1876, this case came on to be heard upon the motion of said complainant, to strike from the files the answer of said defendant.

Thereupon it is ordered that said motion be dropped from the docket, but kept on file, and afterward, to wit: On the 13th
69 day of October, A. D. 1876, came John Swan, Stephen C. Rose, and F. M. Hutchinson and filed in said clerk's office the following motion to wit:

In the Circuit Court of the United States for the Northern District of Ohio, Thomas A. Scott and George W. Cass as trustees, plaintiffs, *vs.* The Mansfield, Coldwater and Lake Michigan Railroad Company, defendants.

Motion. And now come John Swan, Stephen C. Rose and F. M. Hutchinson and move the court for an order upon the plaintiffs in the above entitled case that they may make them, said Swan, Rose and Hutchinson, parties defendant herein, in addition to the defendants already named herein, with leave to answer and to set up their interest in the premises sought to be foreclosed. The ground of this motion is: That the Defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company was formed by the consolidation of the Mansfield, Coldwater and Lake Michigan Railway Company, a corporation created and existing under and by virtue of the laws of the State of Ohio, and the Ohio & Michigan Railway Company, a corporation created and existing under and by virtue of the laws of the State of Michigan. That the contract for said consolidation was entered into on or about the 10th day of May, 1871. That the line of road of said Mansfield, Coldwater and Lake Michigan Railway Company and of said consolidated company passes through the county of Fulton in said State of Ohio, in the Northern District thereof. That the said Swan, Rose and Hutchinson as Swan, Rose & Co., brought their suit against said Mansfield, Coldwater and Lake Michigan Railway Co., and others in the Court of Common Pleas of said Fulton county, and at the February term, A. D. 1875, thereof, recovered a judgment therein against said company for the unpaid balance due them as contractors for the building of said road for the sum of $483,320.17 and that by the laws of Ohio the same is a substituting lien upon the property of said company sought to be foreclosed and sold in this action. That said Swan, Rose & Co., also brought their action agai-st said Mansfield, Coldwater and Lake Michigan Railway Company (consolidated), in the same Court of Common Pleas, and at its February term A. D. 1876, recovered a judgment therein against said company for the said unpaid balance, for the sum of $144,294.43 in money and $230,084 in stock and that by the laws of Ohio the same is a subsisting lien on the property of said company sought to be subjected to sale in this action. That they are advised and believe that the mortgage which the plaintiffs seek to foreclose in this action is not a valid lien upon the property therein described, superior in law to their said liens; and that as against the same they have a good and sufficient defense which they can set forth and cause to appear if made parties to this action and allowed to answer, as in this their motion is prayed.

OTIS, ADAMS & RUSSELL,
Attorneys of Swan, Rose & Co.

And afterward, to wit: At said October term to wit: On the 25th day of November, A. D. 1876, this cause came on to be heard upon

the motion of John Swan, Stephen C. Rose, and F. M. Hutchinson, partners as Swan, Rose & Co., for an order of said complain-
70 ants, requiring them to make the said Swan, Rose & Co., parties defendant herein, and was argued by counsel on consideration whereof, it is ordered that said motion be granted and that said complainants amend their bill of complaint by making the said Swan, Rose & Co. parties defendant herein accordingly. And afterward to wit: On the 16th day of December, A. D. 1876, came the complainants by their solicitors and filed in said clerk's office the following amended bill of complaint, to wit:

Amended Bill. To the Honorable, The Judges of the Circu-t Court of the United States for the sixth circuit and Northern District of Ohio. Thomas A. Scott, a citizen and resident of the State of Pennsylvania, and George W. Cass, formerly a citizen of the State of Pennsylvania, but now a resident and citizen of the State of New York, bring this their amended bill of complaint against the Mansfield, Coldwater and Lake Michigan Railroad Company, a corporation duly created and organized under the laws of Ohio and of Michigan for the construction of a railroad located within said Sixth Circuit, and partly within said Northern District of Ohio, and partly with- the Eastern and partly within the Western Districts of Michigan, said corporation also being a citizen of Ohio, and having its principal office within said Northern District of Ohio; also against John Swan, a citizen of the State of Pennsylvania, also against Frank Hutchinson, a citizen and resident of the State of Pennsylvania, and Stephen C. Rose, a citizen and resident of the State of Michigan. Said Swan, Hutchinson and Rose being a partnership under the firm name of Swan, Rose & Co. And your orators complain and say: That they hereby adopt and make a part of this amended bill of complaint each and every part and word of their original bill filed herein, and further complain and say that said firm of said Swan, Rose & Co., claim to have a judgment against the Mansfield, Coldwater and Lake Michigan Railroad Company for about the sum of one hundred and seventy-five thousand dollars, and upon said pretended judgment they have caused execution to issue and a levy to be made upon the railroad of said Mansfield, Coldwater and Lake Michigan Railroad Company, being the same property described in the original bill filed herein and thereby claim to have a lien upon said railroad. Wherefore your orators pray as in the original bill filed herein, and further, that your Honors will grant your writ of subpœna, and compel said defendants John Swan, Frank Hutchinson and Samuel C. Rose to appear and answer this bill, and that upon a final hearing a decree of sale be made of said railroad, and of all properties and appurtenances mentioned in the several deeds of trust referred to in said original bill, free and discharged from the pretended lien of said judgment and levy of said Swan, Rose & Co., and that the proceeds of said sale may be applied to the payment of the indebtedness secured by said several deeds of trust, and that your Honors will grant to your orators

such other and further relief as may seem just and equitable in the premises.

R. P. RANNEY AND
J. T. BROOKS,
Solicitors for Complainants.

And afterward to wit: On the 18th day of December, A. D. 1876, came the defendants Swan, Rose & Co., by their solicitors, and filed in said Clerk's office their answer and cross bill, which is in the words and figures following, to wit:

71 Answer, &c., of Swan, Rose & Co.

In the Circuit Court of the United States for the sixth circuit, and the Northern District of Ohio, Thomas A. Scott and George W. Cass, trustees, &c., complainants, *vs.* The Mansfield, Coldwater and Lake Michigan Railroad Company *et al.*, defendants.

Answer and cross-petition of Swan, Rose & Co. Now come defendants, John Swan, Stephen C. Rose and F. M. Hutchinson, composing the co-partnership firm of Swan, Rose & Co., and by leave of the court, first had for their making answer to the bill of complaint by the complainants filed herein for their answer to said bill and their cross petition show to your honors:

1st. That said John Swan and F. M. Hutchinson are citizens of the State of Pennsylvania, and said Stephen C. Rose is a citizen of the State of Michigan. That on or about May 10th, 1871, said defendants with one Robert H. McMann, since a bankrupt, formed a co-partnership firm under the name and style of Swan, Rose & Co., and in said firm name took and entered into the contract with the Mansfield, Coldwater and Lake Michigan Railway Company, one of the corporations which was subsequently consolidated into the defendant, the Mansfield, Coldwater and Lake Michigan Railroad Company for the construction of the road bed and bridges and furnishing the cross ties &c., including all construction preparatory to laying the iron upon all that portion of the defendant railway company's railroad within the State of Ohio, being about one hundred and twenty-four miles thereof and also for doing the like construction work of about forty-seven miles of the Toledo, Tiffin and Eastern Railroad which the defendant railroad company was under contract obligations to build. That subsequently and under said contract first herein named these answering defendants performed said constructions for the defendants, the Mansfield, Coldwater and Lake Michigan Railroad Company (consolidated). That there remains due and unpaid to them, said Swan, Rose & Co., from said original Railway Company aforesaid and from the defendant railroad company (consolidated) for said construction of said road bed and preparing the same for iron as aforesaid a large sum partly as a balance due under said contract and partly for extra work done and performed by said Swan, Rose & Co., in and about said construction work in Ohio over and above the requirements of said contract. That these answering defendants as said Swan, Rose & Co., duly recovered a judgment against said railway company in the Court of Common Pleas of the county of Fulton, in the said

State of Ohio, in the northern district thereof, and upon the line of defendant company's railroad at the February, A. D. 1875 term of said court for the said sum due them as contractors for building said road in the amount of ($483,320 17/100), four hundred and eighty three thousand three hundred and twenty and 17/100 dollars and costs, which judgment by the laws of Ohio is a liability of the defendant railroad company (consolidated) and a subsisting valid lien upon the property from the date of the term of Court aforesaid. That subsequently and in the same action in which said judgment was rendered and at the February term A. D. 1876, of said Fulton county, Ohio, Common Pleas Court, said Swan, Rose & Co., recovered a judgment against the defendant railroad company for the balance
72 due them as contractors for building said railroad in Ohio, in the sum of ($144,294.43) one hundred and forty four thousand two hundred and ninety-four and 43/100 dollars in money, and ($230,084) two hundred and thirty thousand and eighty four dollars in stock of the defendant railroad company and of the Toledo, Tiffin and Eastern Railroad Company at the par value thereof, and for costs. That of the money part of said judgment the sum of ($27,970.82) twenty-seven thousand nine hundred and seventy and 82/100 dollars was for extra work done by said Swan, Rose & Co., for the defendant railroad Company over and beyond the requirement of their contract in building said road, and the remainder of said judgment was for the balance found due them under said contract. That said last named judgment was thereafter levied upon the property of defendant railroad company in each of the several counties in Ohio, through which the line of their said Railroad passes, and became and is a valid subsisting lien upon all of said Company's property sought to be subjected to sale in the complainant's bill herein. That said judgments which remain unreversed and unsatisfied in whole or in part and in full force in favor of these answering defendants constitute the first and only valid and subsisting liens (except taxes) upon property of the defendant railroad company sought to be subjected to a sale by the complainants in their bill in this suit and are a prior lien thereon in law and equity to any lien which may be found in favor of the complainants by reason of their pretended mortgage deed of trust and the pretended supplemental deed of trust or by reason of any supposed bonds pretended to have been issued or iron furnished or expenses incurred thereunder.

Second—For further answer to complainants' bill, Swan, Rose & Co., say: That without waiving but reserving to themselves all and all manner of objections and exceptions which they may lawfully make to the manifold iunsufficiencies, omissions, errors, inaccuracies and misstatements of the bill of complaint of complainants filed herein. They deny that the creation, incorporation and organization of the defendant company as a railroad corporation by consolidation of the two former companies named in the second paragraph of complainants bill took place on or about June 1st, 1871, or till after the pretended execution of the mortgage or deed of trust attached by copy to complainants bill as "Exhibit A." They deny

that defendant company was vested with the powers or privileges of a railroad company in Ohio, or located or engaged in the construction of its said railroad until a period subsequent to the pretended execution of said mortgage.

Third—They deny that the defendant company did on October 1st, 1871, or at any other time duly make and deliver to complainants as trustees or otherwise its deed of trust or mortgage on its road bed, property franchises and income or either of them for the benefit of the holders of any bonds then or ever proposed to be issued by said defendant company under such security for any purpose whatever. They deny that defendant company had, on October 1st, 1871, or at any other time duly resolved to issue from time to time four thousand four hundred and sixty bonds of one thousand dollars each or any other number of any other amount or amounts each or in aggregate under the security of any such pretended
73 deed of trust or otherwise. They deny that the defendant company by said pretended deed of trust or otherwise, did on said October 1st, 1871 or at any other time grant, bargain, sell, convey or transfer to complainants in trust as joint tenants or otherwise any property, franchises, income, estate or rights whatever whether then held or after to be acquired. They deny that said pretended deed of trust or mortgage a copy of which is attached to the bill of complaint and marked "Exhibit A" was the proper and lawful act of said defendant company or that the same was authorized, executed and delivered by said company in conformity with law or in pursuance of the powers vested in it by law. They deny that the same was duly recorded in the recorder's office in each or any of the counties in Ohio and Michigan, in which said defendant company's railroad was located, and has been constructed. They deny that the same became and was and is a valid conveyance for the purposes therein mentioned, and the trust therein pretended to be created, or for any purpose whatsoever. They deny that any trust under the same was ever duly accepted by complainants.

Fourth—They deny that defendant Railroad company did subsequently, and on or about October 1, 1872, or at any other time in pursuance of law, and of the powers vested in it by law, make, execute and deliver to complainants as trustees, its supplemental deed of trust or mortgage, of which a true copy purports to be attached to their bill and marked "Exhibit B." They deny that said supplemental deed of trust or mortgage was the proper act of said defendant Railroad company, and that the same was authorized, executed and delivered by said company in conformity with law, and in pursuance of the powers vested in it by law. They deny the due recording thereof in each or any of the counties in which said railroad is located. They deny that the same ever became or was a valid conveyance for the purposes therein mentioned, and that any trust was therein and thereby created. They deny the due acceptance by complainants of any trust thereunder.

Fifth—They deny that defendant company ever lawfully issued and sold any bonds under either or both of said pretended deeds of trust and said pretended supplemental deed of trust. They deny

that any such bonds are now, or ever have been outstanding in the hands of *bona fide* owners or lawful holders thereof. They deny that any sum remains due and unpaid on account of any such bonds, or of accrued or accruing interest thereon. They deny that on the 19th day of October, 1874, the owners of one thousand coupons of bonds mentioned in the bill, the same having become due and payable on October 1, 1873, and amounting to $35,000, did, by their proper agent or otherwise, present said one thousand coupons for payment at the office of said defendant company in Mansfield, Ohio. They deny that said original and supplemental deeds of trust are the first and paramount lien, or any lien on the railway and the properties therein mentioned.

Sixth—They deny that sixteen thousand dollars or any other sum became due and payable from defendant company to complainants, on or before April 1, 1875, or at any other time under Article 14 of said supplemental deed of trust or otherwise.

74 Seventh—They deny that articles 12 or 4 of said supplemental deed of trust provide for any consequences that should or might follow upon the continuance of default in payment of any semi-annual installments of interest on bonds thereunder for the space of sixty days. They deny that complainants were requested in writing by the owners and holders of a majority in interest of all said bonds or of any bonds, to declare the principle of such bonds to be due, or that they did so declare by instrument in writing or otherwise. They deny that any such notice or declaration was ever served on the secretary of defendant company. They deny that any bonds, interest or sinking fund payment is, or ever has, been due and payable under either of said pretended deeds of trust.

Eighth—For further answer these answering defendants aver the facts to be: That the defendant railroad company did not elect a Board of Directors of itself as a consolidated company, nor complete its organization as such, so as to become in law a railroad corporation, entitled to rights, and obligated by li-bilities as a railroad corporation of Ohio and Michigan, or either of them, till long after the pretended or attempted making of said original and supplemental deeds of trust; and that both said instruments, and that all and singular the acts and transactions done or attempted thereunder, were as to said defendant company, beyond and without its power lawfully to undertake, enter upon, make or transact. That until its organization as such railroad corporation (consolidated), it did not succeed in law to any — either of the rights and properties or the obligations, duties and liabilities of either of the predecessor railroad corporations of which it is a consolidation.

Ninth—That on July 20, A. D. 1871, one Willard S. Hickox, the President of the Mansfield, Coldwater and Lake Michigan Railway Company, of Ohio, assuming the existence of the defendant company, and to be and act as its President, undertook unlawfully to enter into, and so assuming and acting, did enter into what purports to be a written contract by and between the defendant company and the Pennsylvania Company, a corporation of the state of Ohio, of which corporation the complainant, Thomas A. Scott,

then, was and still is, President, and in making which contract said Scott acted for, in the name of, and on behalf of said Pennsylvania Company.

That a copy of said contract is attached to the answer of defendant company filed herein, marked "Exhibit A," and made a part thereof, and is also hereto attached, marked "Exhibit A," and made a part hereof. That said contract was made and entered into by said Hickox, assuming to act for the defendant company as aforesaid, and by said Pennsylvania Company, acting by and through said complainant, Scott, as aforesaid collusively and fraudulently, with intent to transfer to said Pennsylvania Company the possession, property and control of the railroads then and theretofore owned by the predecessor corporations of the defendant company, without any real then present, or in good faith then future promised consideration therefor to said owners, or to defendant company as
75 their then contemplated successors, and with the further fraudulent intent to cause to be issued and sold to innocent purchasers the bonds of defendant company under an apparent but not real security upon said railroad properties, and to take the proceeds of such sales to the wrongful possession and ownership of said Pennsylvania Company under said fraudulent and extortionate contract. That in and by the said fraudulent contract the said Pennsylvania Company, among other things, agreed and bound itself, its successors and assigns, to provide iron chairs and spikes, to ballast and lay the track and sidings over and upon the line of railroad of defendant company, to fence the same, to build depots, station houses and all other buildings, to place said railroad in first-class condition for traffic, and to build especially good machine shops at Mansfield and Coldwater, and all within two years from the date thereof; and further agreed and bound itself to equip and work the whole line aforesaid as a first-class railroad, and to maintain the same.

The said Hickox assuming as aforesaid, undertook on behalf of defendant company among other things, that preferred stock of defendant company should be issued to the amount of actual expenditures, at cash value, made by defendant company in obtaining rights of way, depot grounds, &c., and preparing said railroad for the iron rails; said preferred stock to be entitled to seven per cent. dividends out of the net earnings of defendant company's railroad, and to be the only stock issued by defendant company except the common stock provided in said contract, to be issued to said Pennsylvania Company. The actual expenses of managing, maintaining and operating said road, paying interest on its bonds and providing sinking funds, were to be deducted from its earnings, in arriving at net earnings, out of which to pay dividends on said preferred stock.

Said Hickox assuming as aforesaid therein, undertook that defendant company should deliver to said Pennsylvania Company bonds and common stock of defendant company, the bonds to be dated August 1st, 1871, and of the character described in the bill of complaint, and so secured to the amount of twenty thousand dollars on each mile of track laid of the line of defendant company's railroad.

Said Hickox assuming as aforesaid also therein, undertook that defendant company should deliver to said Pennsylvania Company an amount of common stock of defendant company, five thousand dollars greater than the entire amount or stock issued, or which should be issued by said defendant company for any and all other purposes, said bonds and stock to be delivered to complainants as trustees for delivery to said Pennsylvania Company as fast as material should by said Pennsylvania Company to the amount thereof at the rate aforesaid, and in full as each ten miles should be laid and the track in condition for the passage of trains. And said contract further provided, that net earnings of the railroad as above found, should be applied after paying dividends to said preferred stock aforesaid, to paying dividends on said common stock so provided to be issued to said Pennsylvania Company.

These answering defendants further say: That the real cost of doing and furnishing all that said Pennsylvania Company
76 was to do and furnish under the terms of said contract, and as it did subsequently do and furnish what it did do and furnish thereunder, did not exceed the sum of seven thousand dollars per mile of track actually laid, and that said pretended contract was conclusive, fraudulent, excessive and extortionate to the amount of thirteen thousand dollars per mile in the par value of said bonds per mile, and that the provision of said contract for giving to said Pennsylvania Company five thousand dollars of its (defendant company's) common stock, and one half the residue of all its issued stock of all kinds, and pay dividends thereon, was wholly a bonus entirely without consideration of any kind and made with intent to give said Pennsylvania Company entire control of defendant company within itself, by enabling it to elect and control its Board of Directors and officers in any attempt to issue any stock of said defendant company, in pursuance of or under said contract, was and is against the policy, laws and constitution of the State of Ohio.

10th. These answering defendants further say: That on October 2d, 1871, said Pennsylvania Company and said Hickox, both acting therein in the same manner as in paragraph 9th, hereof described as to said contract "Exhibit A" undertook to enter into what purports to be a traffic contract between defendant company and said Pennsylvania Company, a copy of which is attached to defendant company's answer herein and made part thereof as "Exhibit B" and these answering defendants refer to the same there and also attach copy of the same hereto and mark it "Exhibit B" and make a part hereof and refer thereto for its particular terms and provisions.

11th. These answering defendants further say: That the alleged trust deed or mortgage in the bill of complaint mentioned, and the alleged supplemental trust deed therein, also mentioned, and the bonds in said bill mentioned, were all executed by said Willard S. Hickox, while he was assuming to be and act as hereinbefore set forth as the President of the defendant company and was not, nor did said defendant company at said times exist, and the said trust

deed or mortgage and the said bonds therein and in the said alleged supplemental trust deed or mortgage described are the same trust deed, mortgage and bonds mentioned and provided for in said agreement "Exhibit A" between said Pennsylvania Company and said Hickox, assuming to act as aforesaid on behalf of defendant company and said trust deed, supplemental deeds and bonds were all attempted to be executed and delivered by said Hickox acting as aforesaid under and in attempted pursuance of the said contract "Exhibit A" and not otherwise.

12th. These answering defendants further say: That on the 4th day of May, 1872, the said complainant Thomas A. Scott, then the President of said Pennsylvania Company, as aforesaid, and acting as one of said trustees, induced and procured the said Willard S. Hickox to deliver to him all the bonds described in the bill of complaint herein, in consideration of which and simultaneously therewith as a part of said transaction, the said Pennsylvania Company by the said Scott acting as its President, executed and delivered to said Hickox, for the benefit of said railroad company, a written undertaking dated May 4th, 1872, wherein it was recited that
77 said Hickox had delivered to said complainants as said trustees the said bonds under said supposed contract of July 20, 1871, "Exhibit A" by the terms of which said bonds were to be delivered to said Pennsylvania Company, at the rate of twenty thousand dollars per mile as fast as the iron should be laid and the track in condition for the passage of trains; after which recitals it was stipulated by said Pennsylvania Company, in said written undertaking, that in consideration of the delivery of said bonds before said iron was laid, said Pennsylvania Company obligated itself to take care of and pay all interest which might become due thereon prior to the said time of said railroads being in condition for traffic. That at the times of none of the transactions herein set forth, was said Hickox the President of the defendant company nor authorized to use its name nor act on its behalf. And these answering defendants further say that said bonds were obtained by said complainant Scott as aforesaid in the name of said trustees for and on behalf of said Pennsylvania Company. That at said date of said delivery thereof the said Pennsylvania Company was entitled to no part thereof.

The said bonds are now held by the said Pennsylvania Company under said supposed contract of July 20th, 1871 "Exhibit A" and said contract of May 4th, 1872; that if any of said bonds are held by other parties they are held in the interest of and for said Pennsylvania Company, and none of said bonds are held by *bona fide* owners, but the pretended holders and owners thereof, have and are chargeable with notice and knowledge of all the matters herein set forth, and of all the equities of defendant company, and these answering defendants arising therefrom.

13th. These answering defendants further say that about said May 4th, 1872, said Pennsylvania Company wrongfully obtained and caused to be issued to it certificates for $1,500,000 of the capital stock of defendant railroad company, being more than a majority

thereof, claiming at the time to be entitled thereto, under said supposed contract "Exhibit A" of July 20th, 1871; and claiming to be such stockholders, the Pennsylvania Company has ever since managed and controlled and still manage and control the affairs of defendant company; and said Pennsylvania Company thereby secured a majority of the first Board of Directors of said defendant company elected in January, 1873. That said stock was issued without lawful authority and said Pennsylvania Company was without lawful authority or power in Ohio to become a subscriber for or take the same, and has paid nothing therefor, and is liable under the constitution and laws of Ohio to pay therefor into the treasury of defendant company for its use and benefit the full par face value of said stock in money, and to be and remain liable to the creditors of said company for once the par value of said stock over and beyond the same. That if said stock had been properly paid for as required by law, it would have furnished to defendant railroad company all the means required for completing its said railroad without necessity for issuing any bonds whatsoever. That when said Pennsylvania Company so obtained said bonds and stock, it had in no way complied with any part of its undertakings hereinbefore mentioned, nor had it earned the same nor any part thereof, and whatever defaults may have since occurred in any of the matters nominally
78 attempted to be devolved upon the defendant railroad company by said Hickox as aforesaid, are in fact the wrong and default of said Pennsylvania Company, which is the real party in interest in said alleged bonds and mortgage, and at whose instance and for whose benefit this suit is now collusively prosecuted. That said Pennsylvania Company entirely failed to perform upon its part its said undertakings of said contract of July 20th, 1871.

It pretended to place the iron and rails on about seventy-five miles of said railway and to put about forty-seven miles of that in condition for the passage of trains; but the same was insufficiently and improperly done and not according to the terms of said contract. Said portion of said railroad has not been made a first class road; it is short of ballast, the iron furnished is of inferior quality, the sidings are insufficient, it has not been fenced nor have the proper buildings been erected; the equipment furnished is of inferior quality and of insufficient quantity.

Said Pennsylvania Company has not expended upon said railroad to exceed seven thousand dollars per mile of that portion of said road by it operated, in consequence whereof, its earnings are very light and far less than they would have been if said Pennsylvania Company had complied with the terms of said supposed contract "Exhibit A" on its part.

Said Pennsylvania Company has been in possession of and operating all of said railroad which is operated, and all upon which iron has ever been laid from the beginning of laying iron thereon until the present time. It has never given any account of the earnings of said road. These answering defendants are unable to say how much said earnings have been, but allege that the net earnings have been more than sufficient to pay all interest alleged to have accrued

upon said bonds, and that all interest on said bonds if they had been lawfully outstanding should have been paid by said Pennsylvania Company up to the time of the full completion of said road.

15th. These answering defendants further say, that complainants in prosecuting this action are moved by and are acting in the interest of and collusively with said Pennsylvania Company for the purpose and object of causing said railroad and mortgaged property to be sold and acquired by said Pennsylvania Company through the amount claimed to be due on said pretended bonds in fraud of the rights of these answering defendants.

That the complainant, Scott, who acted for said Pennsylvania Company in the contracts and transactions herein named as aforesaid, controls and directs the action of said trustees in this suit, and controls and directs the officers of said Pennsylvania Company the holders of said bonds, and in pursuance of such direction and control in the direction of the said Pennsylvania Company, it is not made a party to this suit, but sedulously excluded from mention in the bill, although in fact the main real party in interest in actual possession of the property, and claiming possession thereof for an indefinite period under the supposed contracts herein set forth, and are necessary and proper party to this suit.

79 Wherefore, these answering defendants ask that the Court will take an account of the amount due to them under their said judgments, declare the same the first lien upon said railroad property, that said deed of trust or mortgage and said supplemental deed of trust or mortgage set up by complainants in their bill be declared void and of no effect and for a decree of sale of said railroad property, and for the application of the proceeds thereof to the satisfaction of the amount found due to these answering defendants; and for such other and further relief as to this Court may seem just and equitable in the premises.

OTIS, ADAMS AND RUSSELL,
Solicitors for said Defendants.

UNITED STATES OF AMERICA, *Northern District of Ohio,* } ss:

L. A. Russell, being duly sworn, deposes and says: I am one of the solicitors of the above answering defendants in this action, said answering defendants are all not absent from said Northern district of Ohio, and that all the matters and things which are stated in the foregoing answer and cross petition as from the information of others I believe to be true, and that all the several other matters and things therein set forth are true in substance and in fact.

L. A. RUSSELL.

Sworn to before me by said L. A. Russell, and by him subscribed in my presence this 11th day of December, A. D. 1876.

CHAS. H. BILL,
United States Court, Northern District of Ohio.

And afterward to wit: At said October term A. D. 1876, this cause was continued and afterward to wit: At the January term of said Court to wit: On the third day of January, A. D. 1877, came Messrs. John B. Shipman, Henry C. Hedges and C. H. Scribner, solicitors for the said Mansfield, Coldwater and Lake Michigan Railway Company, in the above entitled proceeding, and show to the Court here, that by resolution of the Board of Directors of said Railway Company, adopted Nov. 3, 1876, the said solicitors were directed to make no further defence on behalf of said company to the proceedings of the complainants herein, and thereupon the said solicitors withdrew the appearance of said respondent heretofore entered herein, and on their motion it is ordered that they have leave to withdraw the answer of respondent to the bill of complaint of the complainants; and the same is now withdrawn accordingly.

Continued.

Appearance withdrawn.

And afterward to wit: On the 12th day of January, A. D. 1877, came the complainants, by their solicitors, and filed in said Clerk's office the following replication to wit:

THOMAS A. SCOTT and GEORGE W. CASS
vs.
MANSFIELD, COLDWATER AND LAKE MICHIGAN RAILROAD COMPANY. } In Chancery.

Replication of Thomas A. Scott and George W. Cass, complainants, to the answer of Swan, Rose & Co.

Replication.

These repliants saving and reserving to themselves all, and all manner of advantage of exception to the manifold insufficiencies of the said answer for replication thereto say: That they will aver and prove their said bill to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by these repliants without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied is true. All which matters and things these repliants are and will be ready to aver and prove as this Honorable Court shall direct and pray as in and by their said bill they have already prayed.

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R. P. RANNEY AND J. T. BROOKS,
Solicitors for Complainants.

And afterward to-wit: On the 21st day of March, A. D. 1877, the following order *pro confesso* was entered in the order book in Chancery of said Circuit Court to-wit: It appearing to the Court that said defendant, the Mansfield, Coldwater and Lake Michigan Railroad Company has failed to plead, answer or demur to said complainant's bill it is ordered that said bill be taken as confessed as to the defendant railroad company aforesaid, and afterward to-wit: At said January

Order *pro confesso.*

Continued.

term A. D. 1877, of said Court this cause was continued and afterward to-wit: On the 26th day of June, A. D. 1877, came the defendants Swan, Rose & Co., and filed in said Clerk's office the following motion to wit:

Motion to dismiss.

In the Circuit Court of the United States for the Northern District of Ohio, Thomas A. Scott and George W. Cass trustees plaintiff's, *vs.* the Mansfield, Coldwater and Lake Michigan Railroad Company *et al*, defendants. Motion to dismiss for want of jurisdiction of parties. Now come the defendants John Swan, Lester E. Rose administrator of the estate of Stephen C. Rose, deceased, F. M. Hutchinson, and Robert H. McMann and move the Court to dismiss this suit for want of jurisdiction over the parties thereto on account of citizenship in this. That the pleadings show Thomas A. Scott, one of the plaintiffs to be a citizen of the State of Pennsylvania, and that John Swan and F. M. Hutchinson two of these moving defendants are also citizens of *of* the State of Pennsylvania. Also that the defendant railroad company is a citizen of the States of Ohio and Michigan, while of these moving defendants who under their cross-petition are adverse parties to said defendant corporation. Robert H. McMann is a citizen of Ohio and Stephen C. Rose in his life time and Lester E. Rose his present administrator are citizens of Michigan.

OTIS, ADAMS & RUSSELL,
Attorneys for Swan, Rose & Co.

Motion to vacate order.

And on said last named day and year came the complainants by their solicitor and filed in said Clerk's office the following motion to-wit: In the Circuit Court of the United States for the Northern District of Ohio.

Thomas A. Scott and George W. Cass complainants *vs.* Mansfield, Coldwater and Lake Michigan Railroad Company and others, defendants. Motion to vacate former order. And now comes said complainants by their counsel and move your Honors to vacate an order heretofore made herein compelling complainants to amend their bill and make Swan, Rose & Co. parties defendant hereto and to dismiss said
81 Swan Rose & Co. from this proceeding for the reason that it appears from the answer and cross-bill of said Swan, Rose & Co. that certain members of said firm are citizens of the State of Pennsylvania, wherein resides Thomas A. Scott, one of said complainants and that the further presence of said defendants herein would oust the jurisdiction of the Court as to the original parties hereto.

R. P. RANNEY & J. T. BROOKS,
Counsel for Complainants.

Hearing on motion continued.

And afterward to-wit: At the April term of said Court to-wit: On the 27th day of June, A. D. 1877, this cause came on to be heard upon the motion of defendants Swan, Rose & Co., to dismiss the bill herein filed and also upon the motion

of the complainants to revoke the order hereinbefore entered making Swan, Rose & Co. parties defendant herein and was argued by counsel, and thereupon the arguments of counsel not being concluded the further hearing is adjourned until Friday next and afterward, to-wit: At said April term to-wit: On the 30th day of June, A. D. 1877, came again the parties by their solicitors and this cause came on to be heard upon the motions heretofore heard on June 27th, 1877, and thereupon the arguments of counsel having been further heard but not concluded the further hearing of this cause is adjourned until Thursday next. After to-wit: At said April term to-wit: On the 5th day of July, 1877, came again the parties by their solicitors, and this cause came on to be heard upon the motions heretofore heard on June 27th, 1877, and thereupon the arguments of counsel being concluded this cause was taken under advisement by the Court. And afterward at said April term to-wit: On the 7th day of July, A. D. 1877, came again the parties by their attorneys and the Court being now fully advised in the premises, and it appearing to the Court from the answer and cross-bill filed herein by said Swan, Rose & Co., that certain members of said firm are citizens of Pennsylvania, the State wherein resides one of the complainants, Thomas A. Scott, and that their common citizenship of said State would oust the Court of its jurisdiction herein. It is therefore ordered that the said motion of Swan, Rose & Co. be and the same is hereby overruled and the motion of complainants is hereby sustained. And it is further ordered that this suit be dismissed as to Swan, Rose & Co. to which order and ruling of the Court Swan, Rose & Co. by their counsel except.

Taken under advisement.

Motion dismissed.

And afterwards to-wit: At said April term, on the day and year last aforesaid, the defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, having heretofore withdrawn its answer to complainant's bill, and making no further opposition thereto, and the complainant's bill having at a former term of this court been taken confessed as true, and the defendant further failing to plead, answer or demur to said bill, the cause came on to be heard upon the said bill of complaint and exhibits filed therewith, documentary evidence and the arguments of counsel for complainants in open court. On consideration whereof the Court doth find the equity of the case to be with the complainants, and that all and singular the allegations and charges in said bill of complaint are true. And the Court doth further find that at or about the time mentioned in said bill, said defend-
82 ant did issue and sell, and the same are now outstanding and unpaid in the hands of *bona fide* and legal holders thereof, sixteen hundred bonds, of the kind and issue mentioned in said bill, each of the sum of one thousand dollars, the total amount thereof being sixteen hundred thousand dollars, and that there were due, unpaid, on the 1st day of April, 1877, of the interest warrants or coupons attached to said bonds, including interest on said cou-

Decree.

pons from the time the same became due, the sum of ($426,650.00) four hundred and twenty-six thousand six hundred and fifty dollars, which sum is made up as follows:

1,000 coupons due October 1, 1873, each $35	$35,000.00
Interest on same to April 1, 1877	8,575.00
1,000 coupons due April 1, 1874, each $35	35,000.00
Interest on same to April 1, 1877	7,350.00
1,000 coupons due October 1, 1874, each $35	35,000.00
Interest on same to April 1, 1877	6,125.00
1,600 coupons due April 1, 1875, each $35	56,000.00
Interest on same to April 1, 1877	7,840.00
1,600 coupons due October 1, 1875, each $35	56,000.00
Interest on same to April 1, 1877	5,880.00
1,600 coupons due April 1, 1876, each $35	56,000.00
Interest on same to April 1, 1877	3,920.00
1,600 coupons due October 1, 1876, each $35	56,000.00
Interest on same to April 1, 1877	1,960.00
1,600 coupons due April 1, 1877, each $35	56,000.00
	426,650.00

And the court further find that the defendant has failed to pay to the complainants, one per centum on the amount of said bonds to wit: The sum of sixteen thousand dollars on the first day of April 1875, and a like sum on the first day of April 1876, and a like sum on the first day of April 1877 for sinking fund purposes as by the terms of said mortgage it was bound to do; and that in consequence thereof and in consequence of the failure of said defendant to pay said interest coupons as the same severally became due, the principal of said bonds is by the terms of said original and supplemental deed of trust now due and that the same has been so declared by the holders of the majority in interest of all said bonds and that the said Thomas A. Scott and George W. Cass complainants herein and grantees in trust of the said several mortgages or deeds in trust made as aforesaid by the defendants, have since the default aforesaid of said defendant in the non-payment of interest in arrear on said bonds as aforesaid and in the non-payment of said one per cent. for sinking fund purposes, then requested by the holders of all said bonds to enter upon and take possession of said demised railroad properties and franchises and to sell all and singular the same. Wherefore it is ordered, adjudged and decreed by the court that the said Mansfield, Coldwater and Lake Michigan Railroad Company, on or before the 13th day of July, A. D. 1877, pay into the hands of the complainants in this case the said sums hereinbefore found due, namely: The sum of sixteen hundred thousand dollars as principal and the further sum of four hundred and twenty-six thousand six hundred and fifty dollars as interest together with interest on said several sums until said 13th day of July, 1877, and in de-
83 fault of such payment it is further ordered, adjudged and decreed by the court that the said railroad of said Mansfield, Coldwater and Lake Michigan Railroad Company and all the prop-

erty, rights and franchises, whatsoever now held or owned by said company, including all the railways, ways and right of way, and all the depot grounds, and other lands and all the tracks, bridges, viaducts, culverts, fences and other structures, and all depots, stations and station houses, engine houses, car houses, freight houses, wood houses and other buildings, and all machine shops and other shops held or acquired for use in connection with said railroad, or in connection with the business thereof, and including also all the locomotives, tenders, passenger, baggage, freight and other cars, and all the other rolling stock and equipment and all the machinery, tools, implements, fuel and materials for constructing, operating and repairing or replacing the said railroad, or the equipments or appurtenances of the said railroad, and including also all the franchises of said defendant company connected with or relating to the said railroad or the construction, maintainance or use thereof, together with all and singular, the tenements, hereditaments and appurtenances to the said railroad and premises, or any part thereof belonging or in any wise appertaining, and the reversion and revis--ions remainder and remainders, tolls, incomes, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever as well in law as in equity of the said defendant company of, in and to the same and any and every part and parcel thereof with the appurtenances, and all books of account and vouchers kept by said defendant company and relating to said railroad or the business thereof be sold as herein ordered and directed as an entirety, the same being in the opinion and judgment of this court incapable of being sold separately without waste and material injury to the value thereof, and that the same be sold without appraisement. And the court doth further order and direct that all and singular the foregoing railroad and property and franchises so ordered to be sold as aforesaid shall be sold by Noyes B. Prentice as special Master Commissioner of this Court and to this end the said Noyes B. Prentice is hereby constituted and appointed special Master Commissioner in this case with full power as such to execute and carry into effect the order of sale now herein named, and to do and perform all such other matters and things as shall be ordered and required of him in this behalf. And the court doth further order, adjudge and decree that the said special Master Commissioner before offering said railroad properties and franchises for sale shall first advertise the time and place of the sale thereof, setting forth in such advertisement a concise and pertinent designation of the subject matter to be sold in one of the principal daily newspapers in the cities of Cleveland and Detroit to be continued for not less than thirty days, which sale shall be made by public auction at the Court house of this court in the city of Cleveland, State of Ohio, to the highest bidder for cash or for cash and the coupons and bonds of said Mansfield, Coldwater and Lake Michigan Railroad Company at par, but for not less than the sum of five hundred thousand dollars.

And it is further ordered that the purchaser or purchasers at said

84 sale may after payment of so much cash as may be necessary to discharge all costs and expenses incurred in this proceeding, apply in payment of the balance of such purchase money, the coupons and bonds of said Mansfield, Coldwater and Lake Michigan Railroad Company in the proportion that the amount bid for said railroad properties and franchises bears to the whole amount of said coupons and bonds found due and outstanding by this decree; and the Master Commissioner herein appointed to carry into effect this decree and sell said railroad is hereby ordered to receive said coupons and bonds in payment as aforesaid. In case the amount bid be not sufficient to pay and satisfy all said coupons and bonds, the said Master Commissioner shall detach, take up and cancel the coupons then due, and endorse upon each bond its said proportionate amount for any balance of the amount necessary to satisfy such bid, and redeliver to the purchaser or purchasers the bonds so used with the endorsement thereon; the coupons so detached and cancelled, to be by said Master Commissioner delivered to said Mansfield, Coldwater and Lake Michigan Railroad Company. And it is further ordered that it shall be competent for said Master Commissioner in his discretion to keep open the biddings at the place of sale to be advertised as aforesaid, after publicly opening the same at the time and place appointed, by adjournment from time to time during a period of not more than twenty days inclusive of the first day so to be appointed, and for these purposes an order shall be issued by the clerk under the seal of this court embodying so much of this decree in substance as relates to the duties of said special Master Commissioner and directing and requiring him to carry the same into effect and to return the same with a report of his doings under the same to this court, and if for any cause said special Master Commissioner shall not make sale of said railroad properties and franchises upon the order so to be issued a further order or orders for the same purpose may be issued by the clerk upon the written request of counsel for complainants, until a sale shall be effected in the manner aforesaid, and the same be confirmed by the court. And it is hereby reserved that it may and shall be competent for the court, for good cause, at any time hereafter upon return of any order of sale to be issued as aforesaid (no sale having been made pursuant thereto) to modify the terms and conditions of sale herein prescribed as to the court shall appear just and expedient and upon the report of a sale, the court by an order to be made in the premises may confirm, or for good cause shown, may set aside the same, and direct the same to be again offered and put to sale, and upon confirmation by the court of any sale to be made as aforesaid.

It is further adjudged and decreed by the Court that the purchaser or purchasers upon full compliance with the conditions of sale and the orders of the Court made or to be made herein touching the payment of the purchase money, shall be entitled to take and hold, and the same again to sell or otherwise to dispose of at pleasure; all of the said property and franchises and the appurtenances thereof, so as aforesaid ordered to be sold, by the same title

by which the same are or were at any time before such sale owned, claimed or held by said Mansfield, Coldwater and Lake Michigan Railroad Company, free and discharged from the lien of the mortgage in this decree above mentioned, and free and discharged from all liability for any debt or debts, claim or claims of whatsoever name or nature in behalf of any and all persons whatsoever against said Mansfield, Coldwater and Lake Michigan Railroad Company and from the claims of all persons for — on account of the capital stock now held or claimed in said company, but without prejudice to any claim or lien which Swan, Rose & Co. may be able to assert against said property on account of the matters set forth in the answer and cross-bill heretofore filed by them in this case and upon confirmation of said sale by the court and upon full payment of the purchase-money and compliance with the terms of their purchase by said purchasers to be found by the further order of the Court to be made in the premises; the said Special Master Commissioner in his capacity as such shall by deed to be executed in such form as may be proper to convey real estate, convey the premises so to be sold to the purchasers, their heirs, or successors or assigns, and thereupon said Mansfield, Coldwater and Lake Michigan Railroad Company shall by like deed convey and confirm said premises to said purchasers, their heirs or successors or assigns. And afterwards, to-wit: On the 14th day of July, 1877, the following order of sale was issued in said cause, to-wit:

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Order of Sale.

THE UNITED STATES OF AMERICA, *Northern District of Ohio,* } *ss:*

The President of the United States of America to Noyes B. Prentice, Special Master Commissioner:

Whereas, at a term of the Circuit Court of the United States for the Northern District of Ohio, in the sixth Circuit, begun and held at the city of Cleveland, in said District, on the first Tuesday in the month of April, being the third day of said month in the year of our Lord one thousand eight hundred and seventy-seven and of the Independence of the United States of America the one hundred *the* first. Present: the Honorable Martin Welker, District Judge. Among the proceedings then and there had, were the following, to-wit: On the 7th day of July, A. D. 1877. The defendant, the Mansfield, Coldwater and Lake Michigan Railroad Company having heretofore withdrawn its answer to complainant's bill and making no further opposition thereto, and the complainant's said bill having at a former term of this Court — taken confessed as true, and the defendant still further failing to plead answer or demur to said bill, this cause came on to be heard upon the said bill of complaint and exhibits filed therewith, documentary evidence and the arguments of counsel for complainant in open Court. On consideration whereof the Court doth find the equity of the case to be with the complainants and that all and singular the allegations and charges in said

bill of complaint are true. And the Court doth further find that at or about the time mentioned in said bill said defendant did issue and sell and the same are now outstanding and unpaid in the hands of *bona fide* and legal holders thereof sixteen hundred bonds of the kind and issue mentioned in said bill, each of the sum of one thousand dollars, the total amount thereof being sixteen hundred thousand dollars and that there were due and unpaid on the first day of April, 1877, of the interest warrants or coupons attached to said bonds including interest on said coupons from the time the
86 same became due, the sum of ($426,650.00) four hundred and twenty-six thousand six hundred and fifty-dollars, which sum is made up as follows:

1,000 coupons due October 1, 1873, each $35	$35,000.00
Interest on same to April 1, 1877	8,575.00
1,000 coupons due April 1, 1874, each $35	35,000.00
Interest on same to April 1, 1877	7,350.00
1,000 coupons due October 1, 1874, each $35	35,000.00
Interest on same to April 1, 1877	6,125.00
1,600 coupons due April 1, 1875, each $35	56,000.00
Interest on same to April 1, 1877	7,840.00
1,600 coupons due October 1, 1875, each $35	56,000.00
Interest on same to April 1, 1877	5,880.00
1,600 coupons due April 1, 1876, each $35	56,000.00
Interest on same to April 1, 1877	3,920.00
1,600 coupons due October 1, 1876, each $35	56,000.00
Interest on same to April 1, 1877	1,960.00
1,600 coupons due April 1, 1877, each $35	56,000.00
	426,650.00

And the Court further find that the defendant has failed to pay to the complainants one per centum on the amount of said bonds, to-wit:

The sum of sixteen thousand dollars on the 1st day of April, 1875, and a like sum on the 1st day of April, 1876, and a like sum on the 1st day of April, 1877, for sinking fund purposes as by the terms of said mortgage it was required to do; and that in consequence thereof, and in consequence of the failure of said defendants to pay said interest coupons as the same severally became due, the principal of said bonds is by the terms of said original and supplemental deed of trust now due, and the same has been so declared by the holders of the majority in interest of all said bonds, and that the said Thomas A. Scott and George W. Cass, complainants herein, and grantees in trust of the said several mortgages or deeds in trust made *of* aforesaid by the defendants, have since the default aforesaid of said defendant in the non-payment of interest in arrear on said bonds as aforesaid, and in the non-payment of said one per cent. for sinking fund purposes, been requested by the holders of all of said bonds to enter upon and take possession of said demised railroad properties and franchises, and to sell all and singular the same.

Wherefore it is ordered, adjudged and decreed by the court, that the said Mansfield, Coldwater and Lake Michigan Railroad Company, on or before the 13th day of July, A. D. 1877, pay into the hands of the complainants in this case, the said sums hereinbefore found due, namely: the sum of sixteen hundred thousand dollars as principal, and the further sum of four hundred and twenty-six thousand six hundred and fifty dollars interest, together with interest on said several sums until said 13th day of July, 1877, and in default of such payment, it is further ordered, adjudged and decreed by the court that the said railroad of said Mansfield, Coldwater and Lake Michigan Railroad Company and all the property, rights and franchises whatsoever, now held or owned by said company, including all the railways, ways and rights of way, and all the depot grounds, and all other lands, and all the tracks, bridges, via-
87 ducts, culverts, fences and other structures, and all depots, stations, station houses, engine houses, car houses, freight houses, wood houses and other buildings, and all machine shops and other shops held or acquired for use in connection with said railroad, or in connection with the business thereof, and including also all the locomotives, tenders, passenger, baggage, freight and other cars, and all the other rolling stock and equipment, and all the machinery, tools, implements, fuel and materials for constructing, operating, repairing or replacing the said railroad, or the equipments or appurtenances of the said railroad, and including all the franchises of said defendant company, connected with or relating to the said railroad, or the construction, maintainance, or use thereof, together with all and singular the tenements, hereditaments and appurtenances to the said railroad and premises, or any part thereof belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, incomes, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well at law as in equity of the said defendant company of, in and to the same, and any and every part and parcel thereof with the appurtenances, and all books of account, and vouchers kept by said defendant company and relating to the said railroad or the business thereof be sold as herein ordered and directed and as an entirety, the same being in the opinion and judgment of the court incapable of being sold separately without waste and material injury to the value thereof, and that the same be sold without appraisement. And the court doth further order and direct, that all and singular the foregoing railroad and property and franchises so ordered to be sold as aforesaid, shall be sold by Noyes B. Prentice, as Special Master Commissioner of this Court, and — this end the said Noyes B. Prentice is hereby constituted and appointed Special Master Commissioner in this case with full power as such to execute and carry into effect the order of sale now herein made, and *and* to do and perform all such other matters and things as shall be ordered and required of him in this behalf. And the Court doth further order, adjudge and decree that the said Special Master Commissioner before offering said railroad, properties and franchises for sale, shall first advertise the time and place

of the sale thereof, setting forth in such advertisement a concise and pertinent designation of the subject matter to be sold, in one of the principal daily newspapers in the cities of Cleveland and Detroit, to be continued for not less than thirty days, which sale shall be made by public auction at the court-house of this court in the city of Cleveland, State of Ohio, to the highest bidder, for cash, or cash and coupons and bonds of said Mansfield, Coldwater and Lake Michigan Railroad Company, at par, but for not less than the sum of five hundred thousand dollars. And it is further ordered that the purchaser or purchasers at said sale may after payment of so much cash as may be necessary to discharge all costs and expenses incurred in this proceeding, apply in payment of the balance of said purchase money, the coupons and bonds of the said Mansfield, Coldwater and Lake Michigan Railroad Company, in the proportion that the amount bid for said railroad properties and franchises bears to the whole amount of said coupons and bonds found due and outstand-
88 ing by this decree; and the Master Commissioner herein appointed to carry into effect this decree and sell said railroad, is hereby ordered to receive said coupons and bonds in payment as aforesaid. In case the amount bid be not sufficient to pay and satisfy all said coupons and bonds, the said Master Commissioner shall detach, take up, and cancel the coupons then due, and endorse upon each bond its said proportionate amount for any balance of the amount necessary to satisfy such bid, and redeliver to the purchaser or purchasers the bonds so used with the endorsement thereon; the coupons so detached and cancelled to be by said Master Commissioner delivered to said Mansfield, Coldwater and Lake Michigan Railroad Company.

And it is further ordered that it shall be competent for said Special Master Commissioner in his discretion to keep open the biddings at the place of sale to be advertised as aforesaid, after publicly opening the same at the time and place appointed, by adjournment from time to time during a period of not more than twenty days inclusive of the first day so to be appointed, and for these purposes an order shall be issued by the Clerk, under the seal of this Court, embodying so much of this decree in substance as relates to the duties of said Special Master Commissioner and directing and requiring him to carry the same into effect and to return the same with a report of his doings under the same to this Court, and if for any cause said Special Master Commissioner shall not make sale of said railroad properties and franchises upon the order so to be issued, a further order or orders for the same purpose may be issued by the Clerk, upon the written request of counsel for complainants, until a sale shall be effected in the manner aforesaid, and the same to be confirmed by the Court. And it is hereby reserved that it may and shall be competent for the Court for good cause, at any time hereafter, upon return of any order of sale to be issued as aforesaid, (no sale having been made pursuant thereto) to modify the terms and conditions of sale herein prescribed as to the Court shall appear just and expedient, and upon the report of a sale the Court by an order to be made in the premises may confirm or for good cause shown

may set aside the same, and direct the same to be again offered and put to sale, and upon confirmation by the Court of any sale to be made as aforesaid, it is further adjudged and decreed by the Court that the purchaser or purchasers upon full compliance with the conditions of sale and the orders of the Court made or to be made herein touching the payment of the purchase money, shall be entitled to take and hold, and the same again to sell or otherwise to dispose of at pleasure, all of the said property and franchises and the appurtenances thereof, so as aforesaid ordered to be sold, by the same title by which the same are or were at any time before such sale owned, claimed or held by said Mansfield, Coldwater and Lake Michigan Railroad Company, free and discharged from the lien of the mortgage in this decree above mentioned, and free and discharged from all liability from any debt or debts, claim or claims of whatsoever name or nature, in behalf of any and all persons whatsoever against said Mansfield, Coldwater and Lake Michigan Railroad Company and from the claims of all persons for or on account of the capital stock now held or claimed in said company, but without prejudice to any claim or lien which Swan, Rose & Co. may be able to assert against said property on account
89 of the matters set forth in the answer and cross-bill heretofore filed by them in this case and upon confirmation of said sale by the court and upon full payment of the purchase money and compliance with the terms of their purchase by said purchasers to be found by the further order of the court to be made in the premises, the said Special Master Commissioner in his capacity as such, shall by deed to be executed in such form as may be proper to convey real estate, convey the premises so as aforesaid to be sold to the purchasers, their heirs, or successors or assigns, and thereupon said Mansfield, Coldwater and Lake Michigan Railroad Company shall by like deed convey and confirm said premises to said purchaser-, their heirs or successors or assigns. You are therefore hereby commanded as such Special Master Commissioner to proceed to carry into execution the said decree, as you are therein and thereby directed and required; and to return the same with a report of his doings under the same, to our said Circuit Court of the United States for the Northern District of Ohio, within sixty days from the date of this order.

Witness, the Honorable Morrison R. Waite, Chief Justice of the United States, this 14th day of July, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the 102d.

[SEAL.]

EARL BILL, *Clerk*,
By CHAS. H. BILL,
Deputy Clerk.

And afterwards to-wit: On the 29th day of August, 1877, said Special Master Commissioner returned said order of sale to the Clerk's office of said court, together with the following report of sale, to-wit:

To the Honorable Circuit Court of the United States, for the Sixth Circuit and the Northern District of Ohio:

Report of Sale.

In obedience to your order directed to me in the suit of Thomas A. Scott and George W. Cass, *vs.* The Mansfield, Coldwater and Lake Michigan Railroad Company, pending in your said court, the undersigned, as Special Master Commissioner named in said order, herewith reports: That in obedience to your said order, and a like order directed to me from the United States Circuit Court for the Eastern District of Michigan, made in a certain suit pending in said court wherein said Thomas A. Scott and George W. Cass are complainants, and said Mansfield, Coldwater and Lake Michigan Railroad Company is defendant, and which suit so pending is auxiliary to said cause pending in your Honorable Court, as aforesaid, I caused the railroad of said Mansfield, Coldwater and Lake Michigan Railroad Company, extending from its southern terminus, near the city of Mansfield, in Richland County, Ohio, through the counties of Richland, Crawford, Seneca, Hancock, Wood, Henry, Fulton, and Williams, in the State of Ohio, and through the counties of Hillsdale, Branch, Calhoun, Kalamazoo, Barry and Allegan, in the State of Michigan, to its northern terminus, at Allegan, in the State of Michigan, and all the property, rights and franchises whatsoever, now owned or held by said company, including all the railways, ways and rights of way and all the depot grounds and other lands, and all the tracks, bridges, viaducts, culverts, fences and other structures, and all the depots, stations and station houses, engine houses, car houses, freight houses,
90 wood houses and other buildings, and all machine shops and other shops, held or required for use in connection with said railroad, or in connection with the business thereof, and including also all the locomotives, tenders, passenger, baggage, freight and other cars, and all other rolling stock and equipments, and all the machinery, tools and implements, fuel and materials for constructing, operating repairing or replacing said railroad, or the equipments or appurtenances of said railroad, and including also all the franchises of said defendant company, connected with or relating to the said railroad or the construction, maintenance or use thereof, together with all and singular the tenements, hereditaments and appurtenances to the said railroad and premises, or any part thereof, belonging or in anywise appertaining, and the reversion or reversions, remainder and remainders, tolls, incomes, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim or demand whatsoever, in law as well as equity, of the said defendant company, of, in and to the same, and any and every part and parcel thereof, with the appurtenances, and all books of account and vouchers kept by said company, and relating to its said railroad or to the business thereof, to be advertised to be sold as an entirety at public auction to the highest bidder for cash, or by the application of the coupons and bonds of said Mansfield, Coldwater and Lake Michigan Railroad Company, but for not

less than the sum of five hundred thousand dollars, at the United States Court-house in the city of Cleveland, and the State of Ohio, on Tuesday, the 28th day of August, A. D. 1877, between the hours of ten o'clock A. M. and four o'clock P. M. of said day. That I caused advertisements of said sale to be published and continued thirty days next preceding said day of sale, in each of the following daily newspapers, to wit: The Cleveland Herald and the Detroit Tribune, the same being the principal daily newspapers published in said cities respectively; that at the same time and place of sale so advertised, I proceeded to offer and expose to sale by public auction the said railroad properties and franchises so advertised to be sold as an entirety, and then and there gave public notice to the bidders assembled, that said railroad property and franchises were to be sold free and discharged from the lien of the mortgage named in the decree above mentioned, and free and discharged from all liability for any debts or claims whatsoever, of any and all persons against said Mansfield, Coldwater and Lake Michigan Railroad Company, and from the claim of all persons on account of the capital stock of said company, but without prejudice to any claim or lien which Swan, Rose & Co. may be able to assert against said railroad and properties on account of the matters set forth in the answer and cross-bill, heretofore filed by them in this cause. That at said public auction, at the time and place aforesaid, Joseph Lessley then and there bidding for said railroad, properties and franchises, the sum of five hundred thousand dollars, and his said bid being the highest and best bid therefor, and the minimum sum named in said order of sale hereinbefore mentioned, I struck off and sold the same to said Joseph Lessley at his said bid, payable in cash in hand, for so much as may be necessary to discharge all costs incurred in said suit, and the balance in the coupons and bonds of said company, as follows:

91	Cash necessary to discharge costs of suit	$8,878 17
	1,000 coupons of $35 each, due October 1, 1873	35,000 00
1,000	coupons of $35 each, due April 1, 1874	35,000 00
1,000	" " $35 " " October 1, 1874	35,000 00
1,600	" " $35 " " April 1, 1875	56,000 00
1,600	" " $35 " " October 1, 1875	56,000 00
1,600	" " $35 " " April 1, 1876	56,000 00
1,600	" " $35 " " October 1, 1876	56,000 00
1,600	" " $35 " " April 1, 1877	56,000 00
	Interest on $426,650, (being the principal of all of said coupons, with interest added thereto as the same severally became due, up to April 1, 1877, as per decree) to August 28, 1877	52,165 83
	Credit of $33.71 on each 1,600 bonds	53,936 00
	Whole amount of bid	500,000 00

I did also detach and cancel all the foregoing coupons, and cause the credit of $33.71 to be indorsed on the face of each of said bonds. The coupons cancelled as aforesaid I have surrendered to said de-

fendant company, and the bonds I have restored to the owners thereof.

NOYES B. PRENICE,
Special Master Commissioner.

CLEVELAND, OHIO, *August* 30, 1877.

Received of Noyes B. Prentice, Special Master Commissioner, in case of Thomas A. Scott and George W. Cass *vs.* Mansfield, Coldwater and Lake Michigan Railroad Company, in United States Circuit Court for the Northern District of Ohio, and the Eastern District of Michigan, five thousand dollars, payment in full of amount allowed us for services and expenses as counsel for complainants in the above mentioned case.

J. TWING BROOKS,
R. P. RANNEY.

CLEVELAND, OHIO, *August* 30, 1877.

Received of Noyes B. Prentice, Special Master Commissioner, in the case of Thomas A. Scott and George W. Cass *vs.* Mansfield, Coldwater and Lake Michigan Railroad Company in U. S. Circuit Court for Northern District of Ohio and Eastern District of Michigan, twenty-five hundred dollars ($2,500), amount in full allowed me for services and expenses as trustee and complainant in said case.

GEORGE W. CASS.
By J. TWING BROOKS,
Attorney and Agent.

I hereby constitute and appoint Hon. J. Twing Brooks, of Salem, Columbiana County, Ohio, my attorney and agent to collect and give a-quittance for any allowance that may be made me as trustee named in a certain mortgage executed by the Mansfield, Coldwater and Lake Michigan Railroad Company.

July 28, 1877.

G. W. CASS.

92 United States Circuit Court for the Northern District of Ohio.

THOMAS A. SCOTT, *et al*,
vs.
M. C. & L. M. R. R. Co. } No. 2857.

$158.35. Received of N. B. Prentice, Special Master, one hundred fifty-eight and $\frac{35}{100}$ dollars in full of Clerk's costs, docket fees, fees of transcript from Fulton Co. and fees on depositions.

Cleveland, O., Aug. 30th, 1877.

EARL BILL, *Clerk.*
C. H. B.

Master Commissioner's Sale.

THOMAS A. SCOTT and GEORGE W. CASS,
vs.
MANSFIELD, COLDWATER AND LAKE MICHIGAN RAILROAD COMPANY. } Chancery No. 2857.

United States Circuit Court for the Northern District of Ohio.

By virtue of a decree of said court in the above named case, and by virtue of an auxiliary decree in a suit between the same parties issued in the United States Circuit Court for the Eastern District of Michigan, the undersigned, as Special Master Commissioner of said courts, duly appointed by said courts for that purpose, will sell at public auction, to the highest bidder, for cash, or by the application of coupons and bonds of said Mansfield, Coldwater and Lake Michigan Railroad Company to the extent and in the manner provided in the decrees of said courts, but for not less than the sum of five hundred thousand dollars, at the United States Court House in the city of Cleveland, State of Ohio, on Tuesday, the 28th day of August, A. D. 1877, between the hours of ten o'clock A. M. and four o'clock P. M. of said day the following described property, to wit: The railroad of said Mansfield, Coldwater and Lake Michigan Railroad Company, extending from its southern terminus near the city of Mansfield, in Richland county, Ohio, through the counties of Richland, Crawford, Seneca, Hancock, Wood, Henry, Fulton and Williams, in the State of Ohio, and through the counties of Hillsdale, Branch, Calhoun, Kalamazoo, Barry and Allegan, in the State of Michigan, to its northern terminus at Allegan in the said State of Michigan, and all the property, rights and franchises whatsoever, now owned or held by said company, including all the railways, ways and rights of way, and all the depot grounds and other lands, and all the tracks, bridges, viaducts, culverts, fences and other structures, and all the depots, stations and station houses, engine houses, car houses, freight houses, wood houses, and other buildings, and all machine shops and other shops, held or required for use in connection with said railroad or in connection with the business thereof; and including also all the locomotives, tenders, passenger, baggage, freight and other cars, and all other rolling stock and equipment, and all the machinery,
93 tools and implements, fuel and materials, for constructing, operating, repairing or replacing the said railroad, or the equipments or appurtenances of said railroad, and including also all the franchises of said defendant company, connected with or relating to the said railroad, or the construction, maintenance or use thereof, together with all and singular the tenements, hereditaments and appurtenances to the said railroad and premises or any part thereof belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, tolls, incomes, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim or demand whatsoever in law as well as

in equity of the said defendant company, of, in and to the same, and any and every part and parcel thereof, with the appurtenances, and all books of account and vouchers kept by said defendant company, and relating to its said railroad or to the business thereof to be sold as an entirety. Said decree provides that the purchaser, upon the confirmation of the sale, and a full compliance with the conditions thereof, shall hold all the property, rights, franchises and the appurtenances thereof, so sold, by the same title by which the same are held by the said Mansfield, Coldwater and Lake Michigan Railroad Company, free from the lien of the mortgage named in said decree, and free from all liability for any debts against said Mansfield, Coldwater and Lake Michigan Railroad Company, and from all claims on account of the capital stock of said company.

NOYES B. PRENTICE,
Special Master Commissioner.

Cleveland, July 24, 1877.

STATE OF MICHIGAN, } ss:
Wayne County, }

Charles L. Palmer of the city of Detroit, in said state and county, being duly sworn, deposes and says that the annexed notice has been duly published in the Detroit Daily Tribune, a newspaper published and circulating in said city, state and county, for thirty successive publication days and that the first publication thereof was on the twenty fourth day of July, A. D. 1877; that he is the principal clerk of the printer of said newspaper, and that he knows well the facts herein stated.

CHAS. L. PALMER.

Sworn to and subscribed before me this twenty-seventh day of August, 1877, at said city and county.

O. L. KINNEY,
Notary Public, Wayne County, Mich.

THE STATE OF OHIO, } ss:
Cuyahoga County, }

Edwin A. Crable, being duly sworn says, that he is clerk of the publishers of the Cleveland Herald, a public newspaper, printed and published daily in the city of Cleveland, and of general circulation in said county, and that the notice hereto attached was published in said newspaper on the 24th day of July, 1877, and for 29 times consecutively thereafter daily.

EDWIN A. CRABLE.

Subscribed by the said Crable and by him sworn to before me this 30th day of August, 1877.

[SEAL.] A. W. FAIRBANKS,
Notary Public.

94 And afterwards on Thursday August 30th, 1877, being a day of the April term, A. D. 1877, of said court, to wit:

THOMAS A. SCOTT *et al.*
vs.
THE MANSFIELD, COLDWATER AND LAKE MICHIGAN RAILROAD COMPANY.

Order confirming sale.

Noyes B. Prentice, Special Master Commissioner herein, having returned our order of sale to him directed in this suit with a report of his proceedings had in pursuance thereof, thereto annexed, whereby it appears to the court that the railroad property and franchises of said Mansfield, Coldwater and Lake Michigan Railroad Company ordered to be sold, were by him caused to be advertised to be sold in conformity with said order, and that in pursuance to said advertisement he did, on the 28th day of August, A. D. 1877, between the hours of ten o'clock A. M. and four o'clock P. M., at the Court-house of this Court, in the city of Cleveland, in the State of Ohio, by public auction, expose to sale said railroad property and franchises, and that Joseph Lesley then and there appeared and bid for the said railroad, property and franchises the sum of five hundred thousand dollars ($500,000), payable as follows: In cash in hand for so much as may be necessary to discharge all costs and expenses incurred in this suit, together with allowances made for trustee and counsel for complainants herein, to wit: The sum of eighty-eight hundred and ninety-eight and 17–100 dollars, and the balance in the coupons and bonds of the said Mansfield, Coldwater and Lake Michigan Railroad Company, and that his said bid being the highest and best bid therefor, and the minimum sum named in said order, he had struck off and sold the same to said Joseph Lesley on his said bid.

And the Court having inspected said report and the proceedings of said Special Master Commissioner, doth find that said sale and proceedings were in all things had and made according to law, and in conformity with the order and decree of this court in that behalf and doth approve and confirm the same.

And it being further made to appear to the Court that the said Joseph Lesley has paid the purchase money by him bid as aforesaid, it is ordered that said Special Master Commissioner and said Mansfield, Coldwater and Lake Michigan Railroad Company do convey the said railroad, properties and franchises to said Joseph Lesley upon his request, in conformity with our former order in the premises, and that they surrender said railroad, property and franchises upon his request.

And the Court doth further order that out of the cash paid by said purchaser the sum of twenty-five hundred dollars be allowed and paid to George W. Cass, one of the trustees and complainants herein for his services and expenses incurred as such trustee. Also that the sum of five thousand dollars be allowed and paid to the counsel for complainants in compensation for their services, and to reimburse them for expenses incurred herein.

95 In the Circuit Court of the United States, for the Northern District of Ohio—Eastern Division.

THOMAS A. SCOTT and GEORGE W. CASS,
vs.
THE MANSFIELD, COLDWATER AND LAKE MICHIGAN RAILROAD CO., *et al.*
} Chancery.—No. 2,857.

NORTHERN DISTRICT OF OHIO, *ss:*

I, August J. Ricks, Clerk of the Circuit Court of the United States for said District, do hereby certify that the annexed and foregoing pages contain a full and true copy of the original pleadings, records and proceedings in the above case, as fully hereinbefore entitled, so full and entire as the same remains of record and on file in my office and now under my custody as Clerk of said Court.

In testimony whereof, I have hereunto signed my name and affixed the Seal of the said Court at Cleveland, in said District, on this 15th day of July, A. D. 1887, and of the 112th year of the Independence of the United States of America.

[SEAL.] AUGUSTUS J. RICKS, *Clerk*,
By O. C. BEATTY, *Deputy Clerk*.

96 And afterwards, to wit, on the 30th day of August, the following writ of subpœna was issued in this cause, and which is in the words and figures following, to wit:

THE UNITED STATES OF AMERICA,
Northern District of Ohio, Eastern Division, } *ss:*

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon the Mansfield, Coldwater and Lake Michigan Railroad Company, the Northwestern Ohio Railway Company, the Pennsylvania Company, the Pennsylvania Railroad Company, George W. Cass, Reuben F. Smith, J. Twing Brooks, George W. Layng, Frank Janes, F. A. Gorham, Henry C. Hedges, and Stephen B. Sturges, if they be found in your district, to be and appear in the circuit court of the United States within and for the district aforesaid, at Cleveland, on the first Monday in November next, to answer a certain bill in chancery filed and exhibited in the said court against them, by Charles Foster, for himself and others.

Hereof they are not to fail under the penalty of the law thence ensuing, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 30th day of August, A. D. 1887, and in
[SEAL.] the 112th year of the Independence of the United States of America.

A. J. RICKS, *Clerk*,
By O. C. BEATTY,
Deputy Clerk.

97

Memorandum.

The said defendants are required to enter their appearance in this suit, in the clerk's office of said court, on or before the first Monday of October, 1887; otherwise the said bill may be taken *pro confesso*.

A. J. RICKS, *Clerk.*

Endorsed: No. 4548. United States circuit court, northern district of Ohio, eastern division. In chancery. Charles Foster, for himself and others, *vs.* The Mansfield, Coldwater and Lake Michigan Railroad Co. *et al.* Subpœna. Returnable October 3, 1887. Rule day for appearance, October 3, 1887. Rule day for answer, November 7, 1887. Returned and filed Sept. 3, 1887. A. J. Ricks, clerk. Doyle and Scott, complainants' solicitors.

NORTHERN DISTRICT OF OHIO, *ss:*

On the 1st day of September, 1887, at Salem, Ohio, I made due service of this writ by leaving a true and duly certified copy thereof at the usual place of abode of the within-named J. Twing Brooks in the hands of his daughter, he being absent from home and could not be found, and on the 2nd day of September, 1887, at Mansfield, Ohio, by delivering a like copy to the within-named Henry C. Hedges and by delivering a like copy to Henry C. Hedges, as
98 last-known vice-president of the within-named The Mansfield, Coldwater and Lake Michigan Railroad Company.

W. F. GOODSPEED,
U. S. Marshal,
By J. S. EBERMAN, *Deputy.*

Service (3)	6 00
Copies	1 50
Travel, 230 miles	13 80
	$21 30

NORTHERN DISTRICT OF OHIO, *ss:*

On the 1st day of September, 1887, at Toledo, Ohio, I made due service of this writ by delivering a true and duly certified copy thereof to the within-named George W. Layng, and on the 2nd day of September, 1887, at said Toledo, by delivering a like copy to the within-named Frank Janes and by delivering a like copy to Frank Janes, secretary of the within-named The Northwestern Ohio Railway Company.

W. F. GOODSPEED,
U. S. Marshal,
By WM. BREED, *Deputy.*

Service (3)	6 00
Copies	1 50
Travel, 113 miles	6 78
	$14 28

NORTHERN DISTRICT OF OHIO, *ss:*

On the 3rd day of September, 1887, at Cleveland, Ohio, I made due service of this writ by delivering a true and duly certified copy thereof to the within-named Reuben F. Smith and by de-
99 livering a like copy to Reuben F. Smith, assistant general manager of the Pennsylvania Company. The within-named The Pennsylvania Railroad Company, George W. Cass, F. A. Gorham, and Stephen B. Sturges not found within my district; neither have they or either of them a residence therein.

W. F. GOODSPEED,
U. S. Marshal.

Service	4 00
Copies	1 00
	$5 00

100 And afterwards, to wit, on the 29th day of September, the following entry *was* appearance was made in this cause, and which is in the words and figures following, to wit:

CHARLES FOSTER
vs.
THE MANSFIELD, COLDWATER AND LAKE MICHIGAN RAILROAD CO. *et al.* } Equity. No. 4548.

We hereby enter appearance in above-entitled cause.
THE NORTHWESTERN OHIO RAILWAY CO.,
By R. P. RANNEY AND J. TWING BROOKS, *Solicitors.*
THE PENNSYLVANIA COMPANY,
By R. P. RANNEY & J. TWING BROOKS, *Solicitors.*

Sept. 29, 1887.

101 And afterwards, to wit, on the 21st day of October, 1887, an affidavit for service upon absent defendants was filed in this cause, and which is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

CHARLES FOSTER, for Himself and Others, Complainant,
vs.
THE MANSFIELD, COLDWATER AND LAKE MICHIGAN Railroad Co., The Northwestern Ohio Railroad Company, The Pennsylvania Company, The Pennsylvania Railroad Company, George W. Cass, Reuben F. Smith, J. Twing Brooks, George W. Layng, Frank James, F. A. Gorham, Henry C. Hedges, and Stephen B. Sturges, Defendants. } In Equity.

Affidavit for Service upon Absent Defendants.

Personally appeared before me, the undersigned authority, A. W.

Scott, who, being duly sworn, says that he is the attorney and agent of the complainant in this cause and has personal knowledge of the facts hereinafter set forth.

Affiant further says that this is a suit in equity commenced
102 in this court to enforce an equitable claim against the property, real and personal, in the bill of complaint described, located within the northern district of the State of Ohio.

Affiant further says that the defendants, the said The Pennsylvania Railroad Company, George W. Cass, Stephen B. Sturges, and F. A. Gorham, are neither of them inhabitants of no*t* are either of them found within the said northern district of the State of Ohio, nor have either of them voluntar-y entered their appearance in this suit.

Affiant further says that the said defendant The Pennsylvania Railroad Company is a corporation under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business in the city of Philadelphia, in said State of Pennsylvania; that said defendant George W. Cass resides at No. 52 West 57th street, in the city of New York, in the State of New York; that the said defendant Stephen B. Sturges resides at No. 305 Washington Ave., in the city of Brooklyn, in said State of New York, and that the defendant F. A. Gorham resides in the city of Grand Rapids, in the State of Michigan; and further affiant saith not.

A. W. SCOTT.

Sworn to before and subscribed in my presence this 20th day of October, A. D. 1887.

WM. A. MILLS,
[SEAL.] *Notary Public, Lucas County, Ohio.*

103 And afterwards, to wit, on Monday, October 24th, 1887, an order was entered on the journal of this cause, and which is in the words and figures following, to wit:

CHARLES FOSTER, for Himself and Others,
vs.
THE MANSFIELD, COLDWATER AND LAKE MICHIGAN RAILROAD CO. *et al.* } Chancery. 4548.

This day came the complainant, by his attorneys, and made known to the court by proper showing that certain of the defendants in this cause, to wit, The Pennsylvania Railroad Company, George W. Cass, Stephen B. Sturges, and F. A. Gorham, are not inhabitants of the northern district of Ohio, and that neither of said defendants can be found within said district nor have either of them voluntar-y entered their appearance in this suit, and that this is a suit commenced in this court to enforce an equitable claim to the property, real and personal, in the bill of complaint described; wherefore, on motion of the complainant, it is hereby ordered that the said several defendants, to wit, The Pennsylvania Railroad Company, George W. Cass, Stephen B. Sturges, and F. A. Gorham, and each of them shall, on or before the fifth day of December, 1887, appear in this cause

and plead, answer, or demur to the bill of complaint therein filed, with notice to said several defendants that upon the failure of either of them to appear, plead, answer, or demur as aforesaid
104 within the time aforesaid, then and in that case this court will entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendants had been served with process within the said northern district of Ohio, said adjudication affecting only the property which is the subject of this suit and under the jurisdiction of this court in said district.

It is further order- that a copy of this order be served upon each of said defendants, as provided by law.

105 And afterwards, to wit, on the 25th day of October, A. D. 1887, four certified copies of the preceding order *was* issued, one of which is in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, } ss:
Northern District of Ohio, Eastern Division, }

At a stated term of the circuit court of the United States within and for the eastern division of the northern district of Ohio, begun and held at the city of Cleveland, in said district, on the first Tuesday in October, being the fourth day of said month, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States of America the one hundred and twelfth—present, the Honorable Martin Welker, district judge—among the proceedings then and there had were the following, to wit:

MONDAY, *October 24th.*

CHARLES FOSTER, for Himself and Others, Complainant,
vs.
THE MANSFIELD, COLDWATER AND LAKE MICHIGAN RAILROAD Co., The Northwestern Ohio Railway Company, The Pennsylvania Company, The Pennsylvania Railroad Company, George W. Cass, Reuben F. Smith, J. Twing Brooks, George W. Layng, Frank Janes, F. A. Gorham, Henry C. Hedges, and Stephen B. Sturges, Defendants.

106 This day came the complainant, by his attorneys, and made known to the court by proper showing that certain of the defendants in this cause, to wit, The Pennsylvania Railroad Company, George W. Cass, Stephen B. Sturges, and F. A. Gorham, are not inhabitants of the northern district of Ohio, and that neither of said defendants can be found within said district, nor have either of them voluntar-y entered their appearance in this suit, and that this is a suit commenced in this court to enforce an equitable claim to the property, real and personal, in the bill of complaint described; wherefore, on motion of the complainant, it is thereby ordered that the said several defendants, to wit, The Pennsylvania Railroad Company, George W. Cass, Stephen B. Sturges, and F. A. Gorham, and

each of them, shall, on or before the fifth day of December, 1887, appear in this cause and plead, answer, or demur to the bill of complaint therein filed, with notice to said several defendants that upon the failure of either of them to appear, plead, answer, or demur as aforesaid within the time aforesaid, then and in that case this court will entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendants had been served with process within the said northern district of Ohio, said adjudication affecting only the property which is the subject of this suit and under the jurisdiction of this court in said district.

It is further ordered that a copy of this order be served upon each of said defendants, as provided by law.

107 THE UNITED STATES OF AMERICA, }
Northern District of Ohio, Eastern Division, } *ss:*

I, Augustus J. Ricks, clerk of the circuit court of the United States within and for said district, do hereby certify that the within is a true copy of order entered upon the journal or the proceedings of said court in the therein-entitled cause; that I have compared the same with the original entry of said order and it is a true transcript therefrom and of the whole thereof.

Witness my official signature and the seal of said court, at Cleveland, in said district, this 25th day of October, A. D. 1887, and in the 112th year of the Independence of the United States of America.

AUGUSTUS J. RICKS, *Clerk*,
[SEAL.] By O. C. BEATTY, *Deputy Clerk.*

108 And afterwards, to wit, on the 1st day of November, 1887, there was filed in this cause a demurrer, which is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

CHARLES FOSTER, for Himself and Others, Complainant,
vs.
THE MANSFIELD, COLDWATER AND LAKE MICHIGAN Railroad Company, The Northwestern Ohio Railway Company, The Pennsylvania Company, The Pennsylvania Railroad Company, George W. Cass, Reuben F. Smith, J. Twing Brooks, George W. Layng, Frank Janes, F. A. Gorham, Henry C. Hedges, and Stephen B. Sturges, Defendants. } In Equity.

Demurrer of The Northwestern Ohio Railway Company, The Pennsylvania Company, Reuben F. Smith, J. Twing Brooks, George W. Layng, Frank Janes, and Henry C. Hedges to the bill of complaint of Charles Foster, complainant.

These defendants, respectively, by protestation, not confessing or

acknowledging all or any of the matters and things in the said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, do demur thereto and, for cause of demurrer, say that it appears by said complainant's own showing by his said bill of complaint that the said complain-
109 ant is not entitled to relief prayed by his said bill against these defendants.

Wherefore and for divers other good causes of demurrer appearing in the said bill of complaint these defendants do demur to the said bill and to all the matters and things therein contained and humbly pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, and they pray to be hence dismissed with their reasonable costs in this behalf sustained.

I certify that, in my opinion, the foregoing demurrer of the above-mentioned demurring defendants to the bill of complaint of Charles Foster, complainant, is well founded in law and proper to be filed in the above cause.

J. T. BROOKS,
Solicitor and of Counsel for Defendants.

UNITED STATES OF AMERICA:

WESTERN DISTRICT OF COMMONWEALTH OF PENNSYLVANIA, } ss:
County of Allegheny, }

J. Twing Brooks, being duly sworn, does depose and say that he has read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

J. T. BROOKS.

Sworn to before me by said J. Twing Brooks and by him subscribed in my presence this 28th day of October, 1887.

[SEAL.] M. H. SHANE,
Notary Public.

110 And afterwards, to wit, on the 7th day of November, 1887, one of the certified copies heretofore issued was returned and filed in this cause. Said certified copy bore the following endorsement:

On this 5th day of November, A. D. 1887, personally appeared Abram B. Myers, and made oath that he served a certified copy of the within order of court on the Pennsylvania Railroad Company by giving the same to John C. Sims, Jr., secretary of said company, and making known the contents of the same to him.

ABRAM B. MYERS,
Dep. U. S. Marshal.

Before me—

SAMUEL BELL,
U. S. Marshal. [SEAL.]

111 And afterwards, to wit, on the 8th day of November, 1887, a certified copy of order heretofore issued in this cause was returned, bearing the following endorsement:

WESTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that I served the within-named F. A. Gorham with a copy of this order by delivering the same copy to him personally, at Grand Rapids, in said district, on the 5th day of November, A. D. 1887.

D. R. WATERS,
U. S. Marshal.

Fee service, $2.00.

112 And afterwards, to wit, on the 10th day of November, 1887, a certified copy of order heretofore issued in this cause was returned, bearing the following endorsement:

I hereby certify that on the 5th day of November, 1887, at the city of New York, in my district, I personally served the order, of which the within is a certified copy, upon the within-named defendant, George W. Cass, by delivering him and at the same time leaving with him a certified copy thereof.

Dated Nov. 5, 1887.

M. T. McMAHON,
United States Marshal, Southern District of New York,
Per JOHN E. DOWLEY, *Deputy.*

113 And afterwards, to wit, on the 14th day of November, 1887, a certified copy of order heretofore issued in this cause was returned, bearing the following endorsement:

I hereby certify that on the 10th day of November, 1887, at 305 Washington St., Brooklyn, Kings county, in the eastern district of New York, the within-named Stephen B. Sturges was personally served with the within order by delivering to and leaving with said Stephen B. Sturges a certified copy of said order.

CHARLES W. STAFFORD,
United States Marshal, E. D. N. Y.,
By CHARLES C. BUCKLEY, *Deputy.*

114 And afterward, to wit, on the 17th day of November, 1887, a demurrer was filed in this cause, and which is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

CHARLES FOSTER, for Himself and Others, Complainant,
vs.
THE MANSFIELD, COLDWATER AND LAKE MICHIGAN Railroad Company, The Northwestern Ohio Railway Company, The Pennsylvania Company, The Pennsylvania Railroad Company, George W. Cass, Reuben F. Smith, J. Twing Brooks, George W. Layng, Frank Janes, F. A. Gorham, Henry C. Hedges, and Stephen B. Sturges, Defendants. } In Equity.

Demurrer of the Pennsylvania Railroad Company to the bill of complaint of Charles Foster, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, does demur thereto and for cause of de-
115 murrer says that it appears by said complainant's own showing by his said bill of complaint that the said complainant is not entitled to the relief prayed by his said bill against this defendant. Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant does demur to the said bill and to all the matters and things therein contained, and humbly prays the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill, and it prays to be hence dismissed with its reasonable costs in this behalf sustained.

I certify that in my opinion the foregoing demurrer of the above-mentioned demurring defendant to the bill of complaint of Charles Foster, complainant, is well founded in law and proper to be filed in the above cause.

J. T. BROOKS,
Solicitor and of Counsel for Defendant.

UNITED STATES OF AMERICA:

WESTERN DISTRICT OF COMMONWEALTH OF PENNSYLVANIA, } *ss:*
County of Allegheny, }

J. Twing Brooks, being duly sworn, does depose and say that he has read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceeding therein.

J. T. BROOKS.

Sworn to before me by said J. Twing Brooks and by him subscribed in my presence this 16th day of November, 1887.

[SEAL.] M. H. SHANE,
Notary Public.

116 And afterward, to wit, on the 5th day of December, 1887, a motion was filed in this cause, and which is in the words and figures following, to wit:

Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

CHARLES FOSTER, for Himself and Others, Complainant,
vs.
THE MANSFIELD, COLDWATER & LAKE MICHIGAN Railroad Company, The Northwestern Ohio Railway Company, The Pennsylvania Company, The Pennsylvania Railroad Company, George W. Cass, Reuben F. Smith, J. Twing Brooks, George W. Layng, Frank Janes, F. A. Gorham, Henry C. Hedges, and Stephen B. Sturges, Defendants. } In Equity.

Motion.

And now comes the complainant, by his counsel, and moves the court for an order to strike out the demurrers herein filed as
117 a defense to the complainant's bill of complaint, for the reason that the same are sham and false, and that the complainant have judgment for the relief prayed for in the complaint, with the costs in his behalf sustained.

DODGE, SCOTT & LEWIS,
Solicitors for Complainant.

THE STATE OF OHIO, } ss:
Lucas County, }

John H. Doyle, being duly sworn, deposes and says that he is one of counsel for complainant in above-entitled cause; that he has read the pleadings therein filed, and that he believes the demurrers thereto are not warranted in law or proper to be filed in the above cause.

JOHN H. DOYLE.

Sworn to before me and subscribed in my presence this 3d day of December, A. D. 1887.

WILLIAM A. MILLS,
Notary Public, Lucas County, Ohio.

118 And afterwards, to wit, on the 5th day of December, 1887, a notice of motion was filed in this cause, and which is in the words and figurse following, to wit:

Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

CHARLES FOSTER, for Himself and Others, Complainant,
vs.
THE MANSFIELD, COLDWATER & LAKE MICHIGAN Railroad Company, The Northwestern Ohio Railway Company, The Pennsylvania Company, The Pennsylvania Railroad Company, George W. Cass, Reuben F. Smith, J. Twing Brooks, George W. Layng, Frank Janes, F. A. Gorham, Henry C. Hedges, and Stephen B. Sturges, Defendants. } In Equity.

Notice of Motion for Appointment of Special Examiner.

119 SIRS: You will please take notice that on the 15th day of December, 1887, in the city of Cleveland, Ohio, the complainant in this cause will make a motion to this court or to the clerk thereof for an order that the standing examiner, A. J. Ricks, Esq., be authorized to act as special examiner herein under the 67th rule as amended to take the testimony of sundry witnesses on the part of said complainant, at such times and places as may hereafter be designated by said special examiner, in conformity with said rule 67 as amended.

Such evidence to be adduced in this cause to be taken orally.

CHARLES FOSTER,
For Himself and Others,
By JOHN H. DOYLE,
His Solicitor and of Counsel.

To R. P. Ranney & J. Twing Brooks.

Dated Toledo, Ohio, Dec. 3rd, 1887.

120 And afterward, to wit, on the 5th day of December, 1887, an assignment was filed in this cause, and which is in the words and figures following, to wit:

Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

CHARLES FOSTER, for Himself and Others, Complainant,
vs.
THE MANSFIELD, COLDWATER & LAKE MICHIGAN RAILroad Company, The Northwestern Ohio Railway Company, The Pennsylvania Company, The Pennsylvania Railroad Company, George W. Cass, Reuben F. Smith, J. Twing Brooks, George W. Layng, Frank Janes, F. A. Gorham, Henry C. Hedges, and Stephen B. Sturges, Defendants. } In Equity.

The complainant hereby sets down for argument the demurrers

of the demurring defendants heretofore filed in above-entitled cause subject to a motion to strike out said defenses.

DOYLE, SCOTT & LEWIS,
Solicitors for Complainant.

121 And afterward, to wit, on the 5th day of December, 1887, a motion was filed in this cause, and which is in the words and figures following, to wit:

Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

CHARLES FOSTER, for Himself and Others, Complainants,
vs.
THE MANSFIELD, COLDWATER & LAKE MICHIGAN RAILroad Company, The Northwestern Ohio Railway Company, The Pennsylvania Company, The Pennsylvania Railroad Company, George W. Cass, Reuben F. Smith, J. Twing Brooks, George W. Layng, Frank Janes, F. A. Gorham, Henry C. Hedges, and Stephen B. Sturges, Defendants. } In Equity.

Motion.

122 And now comes the complainant, by John H. Doyle, of his counsel, and moves the court for an order authorizing A. J. Ricks, the standing examiner of this court, to proceed and take the testimony of sundry witnesses in behalf of the complainant in this cause at such times and places as may be hereafter designated by this court or said special examiner under the 67th rule as amended, and to further order that the evidence to be adduced be taken orally, and that all depositions hereafter taken in pursuance of such order shall be returned to the clerk's office and filed as soon as the taking thereof shall be completed.

JOHN H. DOYLE,
Of Counsel for Complainant.

THE STATE OF OHIO, *Lucas County,* } *ss:*

John H. Doyle, being duly sworn, says that he is one of the solicitors for the complainant in the above-entitled cause; that the testimony of sundry witnesses residing within and without this northern district of Ohio is material and necessary for the complainant in the presentation of such cause.

JOHN H. DOYLE.

Sworn to before me and subscribed in my presence this 3 day of December, A. D. 1887.

WM. A. MILLS,
Notary Public, Lucas County, Ohio.

123 And afterward, to wit, on the 15th day of February, 1888, a motion was filed in this cause, and which is in the words and figures following, to wit:

Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

CHARLES FOSTER, for Himself and Others, Complainant,
vs.
THE MANSFIELD, COLDWATER AND LAKE MICHIGAN Railroad Company, The Northwestern Ohio Railway Company, The Pennsylvania Company, The Pennsylvania Railroad Company, George W. Cass, Reuben F. Smith, J. Twing Brooks, George W. Layng, Frank Janes, F. A. Gorham, Henry C. Hedges, and Stephen B. Sturges, Defendants. } In Equity.

Motion.

And now comes the complainant, by his counsel, and moves the court for leave to amend his bill of complaint theretofore filed in the above-entitled cause.

DOYLE & SCOTT,
Counsel for Complainant.

124 And afterward, to wit, on the 16th day of February, 1888, an order was entered on the journal in this cause, and which is in the words and figures following, to wit:

CHARLES FOSTER, for Himself and Others,
vs.
MANSFIELD, COLDWATER AND LAKE MICHIGAN RAILROAD CO. *et al.* } Chancery. 4548.

In this cause leave is given complainant to file amendment to bill in ten days upon payment of costs accruing on amendment.

125 And afterwards, to wit, on the 21st day of February, 1888, an appearance was entered in the order book in this cause, and which is in the words and figures following, to wit:

CHARLES FOSTER
v.
THE MANSFIELD, COLDWATER — LAKE MICHIGAN R. R. CO. *et al.* } Equity. No. 4548.

The Pennsylvania Railroad Company hereby enters its appearance in the above-entitled cause by—

R. P. RANNEY & J. T. BROOKS, *Solicitors.*

Febr'y 21st, 1888.

126 And afterwards, to wit, on February 24, 1888, an amendment to bill was filed in this cause, and which is in words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

CHARLES FOSTER, for Himself and Others, Complainant,
vs.
THE MANSFIELD, COLDWATER AND LAKE Michigan Railroad Company *et al.*, Defendants.
} Amendment to Bill. In Equity.

To the honorable judges of the circuit court of the United States for the northern district of Ohio, eastern division:

Charles Foster, the complainant in the original bill of complaint herein filed, brings this his amendment to his said bill of complaint heretofore filed herein against the defendants and each of them in the said original bill, and, complaining, says that he adopts each and every part and word of his said original bill of complaint heretofore filed herein, and by way of amendment to said original bill and in addition thereto, and to be inserted immediately after the 15th line of the 17th page of his said original bill, the following, to wit:

127 And your orator further avers that the supplemental mortgage mentioned in said bill and answer in said original foreclosure proceedings was not the act of the defendant company; that the allegation in the third clause of the answer therein filed was and is true, and, in addition thereto, your orator avers on information and belief that said supplemental mortgage at the time of its execution by the officers of the Mansfield, Coldwater and Lake Michigan Railroad Company contained full reference to the said interest contract or written undertaking of May 4th, 1872, marked Exhibit "C" and attached hereto, the same having been inserted by the officers of said company for the purpose and with the effect of giving to all purchasers of the bonds of said company secured by said mortgage or trust deed due notice regarding the obligations entered into by the said defendant, The Pennsylvania Company; that after the execution by said officers of said supplemental mortgage, and after the same came into the possession of the officers of said Pennsylvania Company and said Thomas A. Scott, as one of said trustees, and without authority from the said The Mansfield, Coldwater and Lake Michigan Railroad Company, the same was altered in a material and important part thereof by striking out the said reference to said interest contract of May 4th, 1872, or taking out of the said mortgage the page on which said reference was made and substituting therefor another page in which said reference was omitted, and said mortgage was placed upon the records as altered and changed by said grantees or trustees and the officers and agents of said Pennsylvania Company as a part of the conspiracy and fraud

aforesaid; that by reason of the alteration in said mortgage in the material part aforesaid the said mortgage became and was wholly void and of no effect.

128 And your orator and the other stockholders of said company were thereby kept from all knowledge and information of the said interest contract and the obligations of said Pennsylvania Company aforesaid; that your orator and the other stockholders of said company that he represents were ignorant of the facts heretofore alleged in reference to the alteration of said supplemental mortgage until after the filing of the original bill herein by your orator, and had no means of ascertaining the same.

And your orator further alleges that during all the time aforesaid the records of said Mansfield, Coldwater and Lake Michigan Railroad Company were kept out of the reach of the stockholders and the complainant; that no meeting of the stockholders was ever called after the said meeting of January, 1874; that no notice was ever given by the secretary of any annual meeting for the election of directors of said company after said annual election of January, 1874, and that the knowledge of said contract, marked E-hibit "C," was purposely kept from the complainant and the other stockholders, your orator believing and being led to believe that said decree of foreclosure was final and said company's property all sold, and that said company was hopelessly insolvent, and that there was no purpose or object in keeping up the organization of said company, and hence no other or further annual meetings were called or held, all of which acts, things, and conditions were brought about by the said defendants, The Pennsylvania Company, its agents and attorneys, as a part of the scheme and conspiracy to obtain the property aforesaid and defraud the stockholders of said Mansfield, Coldwater and Lake Michigan Railroad Company out of the same, and your orator and the other stockholders of said company had no means of obtaining the information or knowledge of the matters and things herein alleged sooner than herein alleged.

129 Your orator further alleges that some time during the month of May, 1886, he was shown a paper which purported to be a copy of said contract of May 4th, 1872, and until said copy was shown him at the time aforesaid he did not know or suspect and had no means of knowing and no reason to suspect any of the unlawful or fraudulent proceedings herein alleged, or that there was or could be any lawful or valid defense to said foreclosure proceedings; that he at once authorized, instituted, and commenced a careful examination of all the facts connected therewith; that he was greatly retarded by his inability to discover the records and papers of said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, or to secure or find the original of said contract of May 4th, 1872, and did not find said records or other papers material herein until within six months of the filing of the bill herein.

That the majority of the board of directors of said company, as hereinbefore alleged, was made up of the officers and employees or agents of the said The Pennsylvania Company, and, acting in its

interest, purposely kept from the stockholders (including your orator) all information and means of obtaining information of the matters and things herein alleged, and purposely failed and neglected to make reports to the stockholders or to call stockholders' meetings for the purpose of conveying to the stockholders or enabling them otherwise to obtain such information; that if your orator had known of the existence of such contract or any of the matters herein alleged in defense of said bill of foreclosure during the pendency of said foreclosure proceedings he would have caused the same to be brought to the attention of the court and have instituted a defense therein.

130 And your orator further avers that by virtue of the contract or written undertaking of May 4th, 1872, which contract or written undertaking is more particularly referred to as "Exhibit C," attached to said original bill of complaint herein, an express trust was created; that the said defendant, The Pennsylvania Company, was, by the terms of said contract or written undertaking, charged with the execution of said express trust thereby created, and that the said The Pennsylvania Company then and there and by reason thereof accepted said trust with all the duties and obligations incident thereto.

And your orator further says that the said trust so created by said contract or written undertaking of May 4th, 1872, still remains unfulfilled, and that no effort was ever made on the part of said defendant, The Pennsylvania Company, to carry out its provisions. On the other hand, your orator avers that the said trustee, the said defendant, The Pennsylvania Company, has, by illegal and fraudulent methods, sought to escape the obligations of said trust, and that it has so contrived as to successfully defraud the said defendant, The Mansfield, Coldwater and Lake Michigan Railroad Company, out of its said property, to the great injury and wrong of the complainant herein and those whom he represents.

DOYLE & SCOTT,
Solicitors for Complainant.

131 THE STATE OF OHIO, }
County of Seneca, } *ss:*

Charles Foster, being duly sworn, deposeth and saith that he is the complainant in the foregoing amendment to his bill of complaint heretofore filed in said cause, and has read the same and knows the contents thereof; that the said amendment to bill is true of his own knowledge, except as to these matters which are therein stated to be on information, and as to those he believes it to be true.

CHARLES FOSTER.

Sworn to before me and subscribed in my presence this 23d day of February, A. D. 1888.

JOHN A. BRADNER,
Notary Public, Seneca County, Ohio.

132 And afterwards, to wit, on the 29th day of May, 1888, a demurrer was filed in this cause, and which is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

CHARLES FOSTER, for Himself and Others, Complainants,
vs.
THE MANSFIELD, COLDWATER & LAKE MICHIGAN Railroad Company, The Northwestern Ohio Railway Company, The Pennsylvania Company, The Pennsylvania Railroad Company, George W. Cass, Reuben F. Smith, J. Twing Brooks, George W. Layng, Frank Janes, F. A. Gorham, Henry C. Hedges, and Stephen B. Sturges, Defendants. } In Equity.

Demurrer of the Pennsylvania Railroad Company to the amendments to complainant's bill of complaint and to the bill of complaint as amended.

The defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the amendments to
133 said bill of complaint and to said bill of complaint as amended to be true in such manner and form as the same are therein and thereby set forth and alleged, does demurr thereto, and for cause of demurrer says that it appears by said complainant's own showing, by the amendments to said bill of complaint and by said bill of complaint as amended, that the said complainant is not entitled to the relief prayed by his amendments to said bill of complaint or by his said bill of complaint as amended against this defendant. Wherefore, and for divers other good causes of demurrer appearing in the amendments to said bill of complaint and the said bill of complaint as amended, this defendant does demur to the said amendments to said bill of complaint and to said bill of complaint as amended and to all the matters and things therein contained, and humbly prays the judgment of this honorable court whether it shall be compelled to make any further or other answer to the amendments to said bill of complaint and the said bill of complaint as amended, and it prays to be hence dismissed with its reasonable costs in this behalf sustained.

I certify that, in my opinion, the foregoing demurrer of the abovementioned demurring defendant to the amendments to the bill of complaint and the bill of complaint as amended of Charles Foster, complainant, is well founded in law and proper to be filed in the above cause.

J. T. BROOKS,
Solicitor for Defendant Pennsylvania Railroad Co.

R. P. RANNEY, *Of Counsel.*

134 COMMONWEALTH OF PENNSYLVANIA, } ss:
County of Allegheny, }

J. T. Brooks, being duly sworn, does depose and say that he has read the foregoing demurrer to the amendment- to the bill of complaint and to the bill of complaint as amended of complainant in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceeding therein.

J. T. BROOKS.

Sworn to before me by said J. T. Brooks and by him subscribed in my presence this 27th day of March, 1888.

M. H. SHANE,
[SEAL.] *Notary Public, Allegheny Co., Penna.*

135 And afterward, to wit, on the 29th day of May, 1888, a demurrer was filed in this cause, and which is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

CHARLES FOSTER, for Himself and Others, Complainant,
vs.
THE MANSFIELD, COLDWATER & LAKE MICHIGAN RAILroad Company, The Northwestern Ohio Railway Company, The Pennsylvania Company, The Pennsylvania Railroad Company, George W. Cass, Reuben F. Smith, J. Twing Brooks, George W. Layng, Frank Janes, F. A. Gorham, Henry C. Hedges, and Stephen Sturges, Defendants. } In Equity.

Demurrer of the Pennsylvania Company to the amendments to complainant's bill of complaint and to the bill of complaint as amended.

136 The defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the amendments to said bill of complaint and to said bill of complaint as amended to be true in such manner and form as the same are therein and thereby set forth and alleged, does demur thereto, and for cause of demurrer says that it appears by said complainant's own showing by the amendments to said bill of complaint and by said bill of complaint as amended that the said complainant is not entitled to the relief prayed by his amendments to said bill of complaint or by his said bill of complaint as amended against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the amendments to said bill of complaint and the said bill of complaint as amended, this defendant does demur to the said amendments to said bill of complaint and to said bill of complaint as amended and to all the matters and things therein contained and humbly prays the judgment of this honorable court

whether it shall be compelled to make any further or other answer to the amendments to said bill of complaint and the said bill of complaint as amended, and it prays to be hence dismissed with its reasonable costs in this behalf sustained.

I certify that in my opinion the foregoing demurrer of the above-mentioned demurring defendant to the amendments to the
137 bill of complaint and the bill of complaint as amended of Charles Foster, complainant, is well founded in law and proper to be filed in the above cause.

J. T. BROOKS,
Solicitor for Defendant Pennsylvania Company.

R. P. RANNEY, *Of Counsel.*

COMMONWEALTH OF PENNSYLVANIA, }
County of Allegheny, } *ss:*

J. T. Brooks, being duly sworn, does depose and say that he has read the foregoing demurrer to the amendments to the bill of complaint and to the bill of complaint as amended of complainant in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceeding therein.

J. T. BROOKS.

Sworn to before me by said J. T. Brooks and by him subscribed in my presence this 27th day of March, 1888.

M. H. SHANE,
[SEAL.] *Notary Public, Allegheny Co., Penna.*

138 And afterwards, to wit, on the 29th day of March, 1888, a demurrer was filed in this cause and which is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

CHARLES FOSTER, for Himself and Others, Complainant,
vs.
THE MANSFIELD, COLDWATER & LAKE MICHIGAN RAILROAD COMPANY, The Northwestern Ohio Railway Company, The Pennsylvania Company, The Pennsylvania Railroad Company, George W. Cass, Reuben F. Smith, J. Twing Brooks, George W. Layng, Frank Janes, F. A. Gorham, Henry C. Hedges, and Stephen B. Sturges, Defendants. } In Equity.

Demurrer of The Northwestern Ohio Railway Company to the amendments to complainant's bill of complaint and to the bill of complaint as amended.

139 The defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the amendments to said bill of complaint and to said bill of complaint as amended to be true in such manner and form as the same are

therein and thereby set forth and alleged, does demur thereto, and for cause of demurrer says that it appears by said complainant's own showing by the amendments to said bill of complaint and by said bill of complaint as amended that the said complainant is not entitled to the relief prayed by his amendments to said bill of complaint or by his said bill of complaint as amended against this defendant.

Wherefore, and for divers other good causes or demurrer appearing in the amendments to said bill of complaint and the said bill of complaint as amended, this defendant does demur to the said amendments to said bill of complaint and to said bill of complaint as amended and to all the matters and things therein contained, and humbly prays the judgment of this honorable court whether it shall be compelled to make any further or other answer to the amendments to said bill of complaint and the said bill of complaint as amended, and it prays to be hence dismissed with its reasonable costs in this behalf sustained.

I certify that, in my opinion, the foregoing demurrer of the above-mentioned demurring defendant to the amendments to the bill of complaint and the bill of complaint as amended of Charles Foster, complainant, is well founded in law and proper to be filed in the above cause.

140 J. T. BROOKS,
Solicitor for Defendant Northwestern Ohio Railway Company.

R. P. RANNEY, *Of Counsel.*

COMMONWEALTH OF PENNSYLVANIA, }
County of Allegheny, } *ss:*

J. T. Brooks, being duly sworn, does depose and say that he has read the foregoing demurrer to the amendments to the bill of complaint and to the bill of complaint as amended of complainant in this suit, and that the *the* same is not interposed for the purpose of delaying said suit or any proceeding therein.

J. T. BROOKS.

Sworn to before me by the said J. T. Brooks and by him subscribed in my presence this 27th day of March, 1888.

M. H. SHANE,
[SEAL.] *Notary Public, Allegheny Co., Penna.*

141 And afterwards, to wit, on the 12th day of May, 1888, an answer was filed in this cause, and which is in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

CHARLES FOSTER, for Himself and Others, Complainants,
vs.
THE MANSFIELD, COLDWATER AND LAKE MICHIGAN RAILROAD COMPANY *et al.*, Defendants. } In Equity.

Answer of Henry C. Hedges.

Now comes Henry C. Hedges, one of the said defendants, and for himself, answering to the bill of complaint of the complainant filed herein, says:

1. That for himself and of his own knowledge this defendant admits that the allegations in the said complainant's bill of complaint are true, so far as the same as by this his said answer
142 will appear to have been known to him are known to him.

He admits the truth of the allegation in the said bill of complaint where the said complainant says that he, the said complainant, in a writing addressed to each of the directors and chief officers of the said def't, The Mansfield, Coldwater & Lake Michigan Railroad Company, did request said directors and chief officers to commence proceedings to set aside and vacate the decree of foreclosure rendered and the sale made in the case in said writing described and for the reason in said writing set forth, and this defendant says that he did receive as one of said directors one of the said writings mentioned in the aforesaid allegation of said complainant's bill and attached to said bill, marked "Exhibit A," and said Exhibit "A" so attached to said bill of complaint is a true copy of the said writings so received by him; and this said defendant, further answering the said allegation, in explanation and by way of avoidance thereof, says—

That as a director of the said def't corporation, The Mansfield, Coldwater & Lake Michigan Railroad Company, he was compelled to neglect and refuse to comply with the request in said writing contained, for the reason that the said def't corporation was wholly without any funds wherewith to meet and provide for the expense of such action; that by reason of the decree rendered against it and the sale made in pursuance of such decree in the foreclosure suit in said writing described and complained of, the said def't cor-
143 poration, The Mansfield, Coldwater & Lake Michigan Railroad Company, was entirely deprived of all its resources, financial and otherwise; and this defendant, by way of avoidance, further says that as a director of said Mansfield, Coldwater & Lake Michigan Railroad Company he was constrained to neglect and refuse to institute the proceedings as in the aforesaid writing he was requested to do, for the reason that he was not prepared to assume the expense or to undertake the responsibility of conducting or directing the litigation that the commencement of such a proceeding would naturally entail. He further says that prior to and after the commencement of the foreclosure proceedings in the aforesaid

writing referred to and therein complained of, and at divers times during the pendency of said foreclosure proceedings, many of the books and other documents belonging to the said defendant corporation, The Mansfield, Coldwater & Lake Michigan Railroad Company, were taken from the general office of the said def't corporation at Mansfield, Ohio, by a person or persons now unknown to the defendant; that in order to establish — truth of the charges made by the complainant in his said writing, the said books, records, and other documents were material and necessary to an action such as the complainant in his said writing sought to have commenced; that this defendant was entirely ignorant of the whereabouts of the said books, records, and other documents, and that he did not have the means at his command wherewith to prosecute an investigation for their discovery.

144 This defendant, further answering, says that the facts set out in that portion of the allegations on page 13 of the said bill of complaint wherein the complainant alleges in the words following, to wit: "All of whom were aided and abetted by Henry C. Lewis, the president of said def't, The Mansfield, Coldwater & Lake Michigan Railroad Co., now deceased, and Jos. Fisk, a director of said company, also now deceased, both of whom your orator avers were directors of the Coldwater, Marshall & Mackinaw Railroad Company, to which company was to be given by the said Thomas A. Scott and Geo. W. Cass, trustees, a large portion of the property of said defendant, The Mansfield, Coldwater & Lake Michigan Railroad Company, to induce said Lewis and Fisk, as directors of said def't, The Mansfield, Coldwater & Lake Michigan Railroad Company, to favor the withdrawal of said answer and defense as aforesaid," are all of them new to this defendant, and until the filing of the said complainant's bill of complaint herein this def't never had any knowledge of such fraudulent and unlawful acts, nor had he any suspicion whatever that the answer and defense filed and made by the said def't, M., C. & L. M. R. R. Co., in the foreclosure proceedings in the said complainant's bill of complaint complained of was withdrawn as the result of said fraudulent and unlawful acts and alleged conspiracies.

And this defendant, further answering, in explanation and denial of any wrongful acts that may be imputed to him as one of
145 the officers and directors as aforesaid, and by way of avoidance, says that at a meeting of the board of directors of the Mansfield, Coldwater & Lake Michigan Railroad Company held on the 10th day of May, 1871, this defendant was duly and legally elected the secretary of said def't company, and that he continued in said office and in the performance of the duties appertaining and incident thereto until the first Monday in January, 1874; and afterward, on the first Monday in January, 1874, and at a meeting of the stockholders of the said defendant The M., C. & L. M. R. R. Co., duly and legally called and held for the purpose, a board of directors of the said defendant The M., C. & L. M. R. R. Co. was elected, and this defendant was duly and legally chosen one of the members of said board of directors elected as aforesaid; and afterward, on

the 23rd day of January, 1874, the said board of directors met in the city of Toledo, Ohio, and were qualified, and at this meeting said defendant was duly elected vice-president of the said def't The Mansfield, Coldwater & Lake Michigan Railroad Company; that from the dates of his election as a director and vice-president he continued in said offices as director and vice-president, and that he believes he was, and so avers the fact to be that he was, one of the last elected directors of said M., C. & L. M. R. R. Co. and the last elected vice-president thereof.

This defendant, further answering, and by way of avoidance, says that after service of the writ of subpœna on the said defendant The Mansfield, Coldwater & Lake Michigan Railroad Company
146 in the foreclosure proceedings in said complainant's bill of complaint complained of, and at a meeting of the board of directors of the said defendant The Mansfield, Coldwater & Lake Michigan Railroad Company held at the Boody house, in the city of Toledo, Ohio, on the 24th day of January, 1876, a resolution was duly passed by said board in matter and result as is alleged in the 3rd paragraph, on page 12, of the said complainant's bill; that in pursuance of said resolution so passed and in conformity with its provisions this defendant was selected as one of the att'ys of the said defendant The M., C. & L. M. R. R. Co. in the proceedings in said resolution referred to, which said proceedings are the same as the said complainant in his said bill of complaint filed herein has complained of; and this defendant says that as one of the att'ys selected as aforesaid he did not take any active part in the prosecution of the defense so authorized by said resolution; that afterward this defendant was present at a meeting of the board of directors of the said defendant The M., C. & L. M. R. R. Co., held, pursuant to a call, on the 18th day of August, 1876, at the city of Toledo, Ohio, at which meeting a resolution was presented by the said def't, J. Twing Brooks, which said resolution purported to direct the counsel of the def't The M., C. & L. M. R. R. Co. in the foreclosure proceedings then pending to enter its, the said defendant company's, consent to an order authorizing the Coldwater, Marshall & Mackinaw Railroad Company to remove and relay certain ties and iron, as in
147 said resolution is set out in full, attached hereto, marked Exhibit "A," and made a part hereof, and this def't here refers to the same for the particular terms thereof; and this defendant further says that said resolution was passed and he voted for the same, but at the time of casting his vote in favor of said resolution he did not know of the fraudulent and wrongful arrangement entered into by the complainants in said foreclosure suit and proceedings with said Coldwater, Marshall & Mackinaw R. R. Company and certain of the directors of the defendant The Mansfield, Coldwater & Lake Michigan R. R. Co., as is charged in the 3rd paragraph, on page 13, of the said complainant's bill of complaint herein.

This defendant further says that had he been aware of the fraudulent and wrongful combination not exhibited by the complainant in his said bill of complaint as aforesaid he would at said meeting of

May 18, 1876, have voted against said resolution and would — strenuously objected to the adoption of the same by the board.

And afterwards, on the 3rd day of November, 1876, another meeting of said board of directors was held, pursuant to a call, in the city of Toledo, Ohio, whereat a resolution was presented by said defendant herein, the said Reuben F. Smith, which said resolution directed that the opposition theretofore made by said defendant The M., C. & L. M. R. R. Co. in the foreclosure suit brought against said company by the said Thomas A. Scott and Geo. W. Cass,
148 trustees, in the United States circuit court at Cleveland, Ohio, should cease, and thereupon and on the question of the adoption of said resolution the defendant and the said def't Stephen B. Sturges voted in the negative; and after the adoption of the said resolution in such manner and form as the said complainant in his said bill of complaint doth allege this defendant and the said Stephen B. Sturges, having first obtained leave of the said board in said meeting so assembled, did file their joint and written protest against the action of the said board in passing said resolution, and the said protest was then and thereby made a part of the record of said meeting and of said resolution; and this defendant herewith exhibits a true copy of said resolution so adopted, together with the record of said vote and the said protest therein filed, attached hereto and marked Exhibit "B" and made a part hereof.

And this defendant, further answering, says that since the filing of the said complainant's bill of complaint herein and in Exhibit "D" attached to said complainant's bill and made part thereof, which said Exhibit "D" purports to be a true copy of the record made in said cause entitled Thomas A. Scott and Geo. W. Cass against The Mansfield, Coldwater & Lake Michigan Railroad Company *et al.*, he has discovered an entry in the record of said cause in words following, to wit:

On the 3rd day of January, A. D. 1877, came Messrs. Jno.
149 B. Shipman, Henry C. Hedges, and C. H. Scribner, solicitors for the said Mansfield, Coldwater & Lake Michigan Railroad Company in the above-entitled proceeding, and shows to the court here that by resolution of the board of directors of said railway company adopted November 3, 1876, the said solicitors were directed to make no further defense in behalf of said company to the proceedings of the complainants herein, and thereupon the said solicitors withdrew the appearance of said respondent heretofore entered herein, and, on their motion, it is ordered that they have leave to withdraw the answer of respondent to the bill of complaint of the complainants, and the same is now withdrawn accordingly.

And this defendant avers that he was not present in said court, and that the said entry so made in the record of said court in said cause, in so far as the same pertains to him as one of the solicitors of said def't company therein named, is not true or correct; that he never authorized or consented to said entry, and further says that this defendant never had any knowledge of said entry made as aforesaid until the filing of the said bill of complaint herein, as he now verily believes.

And this defendant, further answering, says that until the filing of the complainant's bill of complaint in this cause he was entirely ignorant of and had no reason to suspect any of the illegal and fraudulent and wrongful acts therein recited.

Wherefore, and to the end that the equities and rights of
150 the said defendant corporation, The Mansfield, Coldwater & Lake Michigan Railroad Company, and that the equities and rights of its stockholders may be established in the premises, this defendant asks this honorable court to listen unto and to grant the prayer for the relief sought by the said complainant in this cause, as in his said bill he has already prayed.

HENRY C. HEDGES.

MOSES R. DICKEY, *Solicitor.*

151 EXHIBIT "A."

"After explaining the object of the meeting Mr. J. T. Brooks presented the following resolution, which was unanimously carried:

Resolved, That the counsel representing this company in the foreclosure suit now pending in the United States circuit court for the northern district of Ohio, wherein Thomas A. Scott and Geo. W. Cass are complainants and the M., C. & L. M. R. R. Co. are defendants, be, and they are hereby, directed to enter consent on the part of this company; that an order be granted by the court in said suit permitting the complainants therein to make an arrangement with the Coldwater, Marshall and Mackinaw R. R. Co., whereby the latter company may remove at its own expense and relay on the graded right of way of the M., C. & L. R. R., north of and near Coldwater, about eight miles of ties and iron that are now laid as track and unused southeast of Monteith and operate so much of the line as may be covered with said ties and iron relaid near Coldwater as aforesaid: Provided nothing in the consent so given shall be construed in any — to prejudice or impair the rights of this company in its defense on the merits of said foreclosure suit."

152 EXHIBIT "B."

The following resolution was then offered by Mr. R. F. Smith:

Resolved, That the opposition of this company to the suit against the same in foreclosure, brought by Messrs. Scott and Cass, trustees, in the U. S. circuit court at Cleveland, be, and the same is hereby, directed to cease.

The president will furnish a copy of this resolution to the attorneys heretofore employed in this case and see that the same is carried into immediate effect, and that the resolution heretofore passed, instructing Messrs. Scribner, Shipman & Hedges to enter an appearance and defend in behalf of said company in said suit, be, and the same is hereby, rescinded.

The yeas and nays being called for, the following was the result: Voting yea, Mess. Lewis, Smith, Fiske, Layng, Gorman, Brooks, and Janes; voting nay, Mess. Hedges and Sturges. The resolution was carried.

The following protest was then presented in writing:

TOLEDO, OHIO, *Nov. 3rd*, 1876.

On the passage of the above resolution, offered by Reuben F. Smith, we, S. B. Sturges and Henry C. Hedges, directors of said company, having obtained leave of the board to enter our protest, do hereby protest against the action of said board in passing said resolution.

(Signed) HENRY C. HEDGES.
S. B. STURGES.

153 THE STATE OF OHIO, } ss:
Richland County, }

Henry C. Hedges, being sworn, says that he believes the matter and things in the foregoing answer to be true, as there stated.

HENRY C. HEDGES.

Sworn to before — and subscribed in my presence May 11, 1888.

J. E. LEISER,
[SEAL.] *Notary Public, Richland Co., O.*

154 And afterward, to wit, on the 16th day of May, 1888, an entry was entered in the journal in this cause, and which is in the words and figures following, to wit:

CHARLES FOSTER, for Himself and Others,
vs.
M., C. & L. M. R. R. Co. *et al.* } Chancery. No. 4548.

This day came R. P. Ranney & J. T. Brooks, solicitors for Northwestern Ohio R. R. Co., Pennsylvania Company, and other defendants, and advise the court that inadvertently and by mistake of a copyist, and without any authority, direction, or consent whatever on the part of Henry C. Hedges, the name of said Henry C. Hedges was inserted in the list of defendants in whose behalf said solicitors have filed a general demurrer to the bill of complaint herein filed by the complainant, and upon their motion it is ordered by the court that the name of said Henry C. Hedges be erased from said demurrer.

Opinion of Judge Jackson.

155 Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

CHARLES FOSTER, Complainant,
vs.
THE MANSFIELD, COLDWATER AND LAKE MICHIGAN RAILROAD CO. *et al.*, Defendants. } In Equity.

On demurrer.

The object and purpose of the present bill is to open the decree of this court rendered in 1877 in the foreclosure proceeding in the case of "Thomas A. Scott and George W. Cass *vs.* The Mansfield,

Coldwater & Lake Michigan Railroad Company," under which said company's line of road, with its franchises and property, was sold. The decree in said cause is sought to be set aside and vacated on the ground that it was obtained by fraud and worked an injury and wrong to said railroad Co., which the corporate management, after request on the part of the complainant as a stockholder therein, have refused or neglected to take steps to remedy or redress.

156 There is no want of jurisdiction growing out of the fact that some of the defendants to the present suit are citizens of the same State (Ohio) with the complainant, inasmuch as this suit may properly be regarded as ancillary or supplementary to the original suit in which the decree complained of was made. It is well settled that in such cases suit may be maintained without regard to the citizenship of the parties.

See Minnesota Co. *vs.* St. Paul Co., 2 Wallace, 609–633;
Krippendorf *vs.* Hyde, 110 U. S., 276, and
The Pacific R. R. of Mo. *vs.* The Missouri Pacific R. Co., 111 U. S., 505.

It is also well settled that a shareholder may interpose and set the machinery of the law in motion for the protection of corporate rights or the redress of corporate wrongs when the corporate management, after proper demand, refuse or fail to act in the matter. Generally, when it is necessary to sue in order to enforce corporate rights or avert wrongs threatening the corporate interests, the suit must be brought by the corporate management in the name of the corporation. This rule applies to suits both at law and in equity. Individual shareholders are not, ordinarily, the proper parties to sue or defend on behalf of corporate interests. If, however, the corporate management fails or refuses to protect or enforce corporate rights after proper request so to do or commits breaches of trust or is guilty of fraudulent acts and conduct, whereby irreparable injury is done or threatened to corporate interests, a shareholder in a case where the corporation itself would be entitled to sue and obtain relief may bring suit on behalf of himself and others in like situation for the protection or assertion of corporate rights and interests.

157 "The conditions and circumstances under which the individual stockholder is allowed to sustain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself and in which the corporation itself would be the proper complainant are fully set forth in Hawes *vs.* Oakland, 104 U. S., 450–460, and in the requirements of equity rule 94. It is important to bear in mind that the rights involved in such suits are not those of the shareholder who sues, but of the corporation whose rights are sought to be asserted. The cause of action which the individual stockholder is allowed to enforce in such cases is one belonging, not to the stockholders, but to the corporation itself. Thus, in Davenport *vs.* Dows, 18 Wallace, 626, it is said: "But such a suit can only be maintained on the ground that the rights of the

corporation are involved. These rights the individual shareholder is allowed to assert on behalf of himself and associates because the directors of the corporation decline to take the proper steps to assert them. The relief is asked on behalf of the corporation, not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it." The present suit falls within this rule, and the case presented by the demurrer to the bill then divides itself into two leading questions: First, has the Mansfield, Coldwater & Lake Michigan Railroad Company, under the showing made by the bill, any right to complain of the decree rendered by this court in 1877 in the foreclosure suit of Thomas A. Scott and George W. Cass against said corporation? And, secondly, if
158 the company was ever entitled to have said decree set aside and vacated for fraud in its procurement, has that right been lost by the "laches" of itself or of complainant in the assertion of said rights?

The record in the case of "Thomas A. Scott and George W. Cass *vs.* The Mansfield, Coldwater and Lake Michigan Railroad Co. *et al.*" is filed with and made a part of complainants' bill. It appears from the bill and said record that said Scott and Cass, as the trustees under the original and supplemental mortgages executed by said Mansfield, Coldwater & Lake Michigan Railroad Co. on the 1st October, 1871, and 1st October, 1872, respectively, to secure the *the* payment of certain coupon bonds issued by said company, filed their bill in this court on January 20th, 1876, against said railroad company and Swan, Rose & Co., general creditors thereof, to have said mortgages foreclosed by a sale of the road and other property covered by or embraced in the mortgages because of the default of the mortgager in the payment of the interest on $1,600,000 of said bonds then outstanding in the hands of *bona fide* and lawful holders thereof. The interest accrued thereon and alleged to be in default was stated to be $270,000, $35,000 of which was due Oct. 1, '73; $35,000 was due and payable April 1, '74; $56,000 became due April 1, '75, and $56,000 matured Oct. 1, '75; which several installments, with interest since date of maturity till time of filing the bill, amounted to the sum of $270,000. The trustees further alleged that the railroad Co. had failed to pay or provide the sinking fund of 1 per cent. required by the mortgages on the $1,600,000 of bonds so issued and outstanding, and that under and in accordance with
159 the terms and provisions of said trust deeds or mortgages said bonds had been properly declared and made due as to the principal thereof because of such defaults on the part of the mortgagor. Said original and supplemental trust deeds or mortgages were filed with and made parts of the bill to foreclose as Exhibits A and B thereto, and purpoeted on their face to be regularly executed by proper officers of the corporations under proper authority from the company. The defendant railroad Co. was duly served with process on the 24th January, 1876, and on the 17th April, 1876, it filed its answer in the cause. In said answer it denied that it was duly and legally organized and incorporated as a corporation whose said mortgages were executed and said bonds issued. It averred

that its incorporation and organization was not perfected and completed until January 6th, 1873, and that prior to said date it possessed no power or authority to execute and deliver either said bonds or mortgages. It therefore denied that said mortgages were the proper act of the corporation or constituted any valid lien on its railway and property. The answer then, by the 8th paragraph thereof, proceeded to set out how and under what circumstances the corporation was formed and organized, showing that it was legally organized on June 1, 1871, when the agreement of consolidation, with the record of the action thereon by the stockholders of the respective companies, properly certified by the secretary thereof, was filed in the office of the secretary of state of Ohio; but the claim of a want
160 of proper organization was based on the alleged fact that no election of directors was had under the consolidation till January 6th, 1873. Said clause of the answer further set out in detail how one Willard S. Hickox, assuming to act in the name of and on behalf of said company, had entered into contracts for the ironing and equipment of said company's line of road, for which the other contracting parties, the Pennsylvania Company, was to be paid in stock and bonds, the latter to be secured by mortgage, and that said original and supplemental mortgages made a part of complainants' bill, and the bonds mentioned and provided for therein were the same mentioned and provided for in said agreement of July 20th, 1871, between said Pennsylvania Co. and said Hickox, assuming to be president of the said railroad company. The answer admitted that under said contract with the Pennsylvania Company the latter had "pretended to place the iron and rails upon about 75 miles of the line of said railway and had put about 47 miles of it in condition for the passage of trains," but claimed that the same are insufficiently and improperly done and not according to the terms of said contract, which provided that the Pennsylvania Co. should receive, besides stock of the defendant company, $20,000 in said bonds per mile as each ten miles of the road was laid with rails and ready for traffic. As a further defense, the answer set up that said Pennsylvania Co., claiming to be entitled thereto, had on the 4th May, 1872, wrongfully obtained $1,500,000 of the stock in defendants' company (being more than a majority thereof) under said contract of July 20th, 1871, by means of which it secured a majority of the members upon defendants' first
161 board of directors and still managed and controlled the affairs of said company, &c., and, further, "that on the 4th day of May, 1872, the said complainant, Thomas A. Scott, then the president of said Pennsylvania Company as aforesaid and acting as one of said trustees, procured and induced the said Willard S. Hickox to deliver to him all of the bonds so executed by said Hickox in the name of defendant as aforesaid. There were 4,460 of the bonds so delivered, numbered from 1 to 4460, inclusive, for $1,000 — #200 each, dated October 1, 1871, with interest coupons attached (the coupons maturing April 1, 1872, having been cancelled and cut off). In consideration of the delivery of said bonds as aforesaid, and simultaneously therewith as a part of said transaction,

the said Pennsylvania Company, by its president, the said Thomas A. Scott, executed and delivered to said Hickox for the benefit of defendant a written undertaking, bearing date May 4th, 1872, wherein it was recited that said Hickox had delivered to complainant as said trustee the bonds above described under said supposed contract of July 20th, 1871, by the terms of which said bonds were to be delivered to said Pennsylvania Company at the rate of $20,000 per mile as fast as material should be delivered to the value thereof and in full as each ten miles of iron should be laid and the track in condition for the passage of trains, after which recital it was stipulated and agreed by said Pennsylvania Company in and by said last-mentioned agreement that, in consideration of the delivery of all of said bonds as aforesaid before said iron was laid, the
162 said Pennsylvania Co. obligated itself to take care of and pay all interest which might become due thereon prior to said line of railway of defendant being in condition for traffic, and it was provided that for all interest so paid for the Pennsylvania Co. and not justly and equitably chargeable thereto under said contract of July 20th, 1871, said Pennsylvania Co. should be reimbursed out of the earnings of defendant's road after the same should be completed in sections under said contract and begin to make earnings on the respective sections as required by the terms of said agreement."

The answer further alleged that at the date of the delivery of said bonds said Pennsylvania Co. was entitled to no part thereof; "that said bonds are now held by said Pennsylvania Co. under said supposed contract of July 20th, '71; that if any of said bonds are held by other parties they are held in the interest of and for said Pennsylvania Co. None of said bonds are held by '*bona fide*' owners, but the pretended holders and owners thereof have and are chargeable with notice of all the matters herein set forth and of all the equities of the defendant arising therefrom."

It was further claimed in said answer that the cost of the work done by the Pennsylvania Co. had not exceeded $7,000 per mile; that it had never earned the stock wrongfully delivered to it, nor had it entitled itself to any interest on the bonds delivered as aforesaid.

And defendant further aver-ed that the complainants in prosecuting said foreclosure suit were moved by and acting in the interest of said Pennsylvania Co.; that their object and purpose was to annihilate and destroy so much of defendant's road as lay
163 west of Tiffin, in Seneca county, Ohio, and to destroy its stock; that the interest of said trustees and of said Pennsylvania Co. and of the holders of said bonds are one and identical; that under said agreement of May 4, '72, said Pennsylvania Co. were bound to pay the interest alleged to have matured upon said bonds and the subsequently accruing interest thereon until the full completion of said road by said Pennsylvania Co. under said contract of July 20th, '71; that complainant Scott, who acted for said company in making said contracts, controls and directs the affairs of said Pennsylvania Co. and the holders of said bonds.

To this answer the complainants duly filed their replication on the 26th day of May, 1876. On the 19th of August, 1876, while the cause was regularly at issue and all parties in interest were before the court, on the motion of complainants, to which the defendant filed its written consent, an order was made by the court allowing the ties and rails to be removed from one portion of the line and relaid upon another portion thereof. Said order, after reciting the written consent of the defendant Co. thereto, proceeds as follows: "And it further appearing to the court that the Pennsylvania Railroad Company" (a separate and distinct corporation from the Pennsylvania Company referred to in the answer), "being the owner and holder of all of the bonds of said Mansfield, Coldwater & Lake Michigan Railroad Company, has also filed herein its written consent that said motion be granted; and it also further appearing that the interests of said Mansfield, Coldwater & Lake Michigan Rail-
164 road Co., as well as of said Pennsylvania Railroad Co., as the owner of said bonds, will be promoted by the removal of said ties and rails and the relaying the same as described in said motion, it is therefore ordered and decreed by the court that said motion be, and the same is hereby, sustained; and it is further ordered and decreed that the complainants herein be permitted to enter into such arrangements with the said Coldwater, Marshall & Mackinaw Railroad Company as may be agreed upon between themselves relative to the taking up, removing, and relaying by the last-named company the ties and rails that are now laid and unused on said Mansfield, Coldwater & Lake Michigan railroad southeast of and for a distance of about eight miles from Monteith, and after the same have been relaid on the graded line of said Mansfield, Coldwater & Lake Michigan railroad, near Coldwater, the said Coldwater, Marshall & Mackinaw Railroad Co. may use so much of said line as is covered by said ties and rails for such time and upon such terms and conditions as may be agreed upon between said last-named Co. and the complainants, provided that before any such arrangements shall be finally consummated said Coldwater, Marshall & Mackinaw Railroad Co. shall execute and deliver to said complainants a bond, with approved sureties, for not less than the sum of $100,000, conditioned that all the covenants on the part of said Coldwater, Marshall & Mackinaw R. R. Co. in respect to the taking up and relaying said ties and rails between Monteith and Coldwater, as well as in respect to the subsequent use of that part of said Mansfield, Coldwater & Lake Michigan
165 R. R. Co., wherever said ties and iron shall be relaid, shall be fully and faithfully performed by said Coldwater, Marshall & Mackinaw R. R. Co. It is further ordered that nothing in this decree nor in the agreement that may be made in pursuance hereof shall give said Coldwater, Marshall & Mackinaw R. R. Co. any rights whatever in relation to the removal of said ties and iron, nor to the use of said railroad, wherever the same shall be laid, after the termination of this case, nor beyond the time when said Mansfield, Coldwater & Lake Michigan R. R. Co. may be sold under and pursuant to any other

or further order that may be made by the court herein. It is also further ordered that nothing in this decree nor in the arrangement that may be hereafter made between the complainants and said Coldwater, Marshall & Mackinaw R. R. Co. shall in any way interfere with the rights or remedies of the owners of said bonds of the M., C. & L. M. R. R. Co., nor of the trustees, complainants herein, either in this or any other proceeding that may be brought to enforce the rights of said bondholders or of said trustees, nor in any way to hinder or delay the further proceedings in this case."

On the 3rd of November, 1876, the directors of the Mansfield, Coldwater & Lake Michigan R. R. Co., by resolution, instructed their attorneys to withdraw all defense to said suit of Scott and Cass, trustees. Henry C. Hedges and Stephen B. Sturges, two of said directors, and the former one of the defendant Co.'s attorneys who signed its answer, entered their written protest against this action of the board of directors. Afterwards, at the January term,
166 1877, of this court, and on the 3rd day of January, 1877, as appears by the record, "came Messrs. Jno. B. Shipman, Henry C. Hedges, and C. H. Scribner, solicitors for the said Mansfield, Coldwater & Lake Michigan R. R. Co. in the above-entitled proceeding, and show to the court here that by resolution of the board of directors of said railway Co., adopted Nov. 3rd, 1876, the said solicotors were directed to make no further defense on behalf of the said company to the proceedings of the complainants herein; and thereupon the said solicitors withdrew the appearance of said respondent heretofore entered herein, and on their motion it is ordered that they have leave to withdraw the answer of respondent to the bill of complaint of complainants, and the same is now withdrawn accordingly." On the 21st of March, 1877, an order "*pro confesso*" was taken and entered against said defendant railroad Co. and the cause continued to the next term of the court, and on June 27th, 1877, a decree was entered finding said company in default in the payment of interest since October 1, 1873, and amounting to $426,650.00; also in the payment of the sinking fund, as provided by the mortgages, and all other facts material and necessary in a decree in complainants' favor, and directing a sale of the company's line of road and property covered by the mortgages upon its failure within the time allowed to pay said indebtedness. The sale was made on the 28th of August, 1877, when the property was struck off at the price of $500,000, the minimum price fixed by the court, to Joseph Lessley, who, as it appears, was acting as the agent of the Pennsylvania Railroad Co., the holder of the bonds and past-due coupons.
167 This sale was confirmed, and the special master commissioner, under the direction of the court, made proper conveyance of the property to the purchasers, who, as appears from the allegations of the bill of complainant Foster, subsequently transferred the same to the Northwestern Ohio Railway Company, which was chartered and organized after the date of said transaction, and which is claimed to be only a branch of said Pennsylvania Company and identical with it.

The present bill seeks to have that decree and sale set aside and

vacated as having been fraudulently obtained and the defendant's answer in said suit reinstated, with leave to complainant and the company to make any and all other defences which they may be able to set up and establish. It is conseded by complainant's bill now under consideration that the Mansfield, Coldwater & Lake Michigan Railroad Co. " were duly and legally created, incorporated, and organized as a railroad corporation of the States of Ohio and Michigan " on or about June 1, 1871. So much of the answer of said company to the foreclosure suit as denied its legal organization and want of power to make the mortgages of October 1, 1871, and October 1, 1872, and to issue the bonds secured thereby may therefore be dropped out of consideration. The other grounds of defence set up in that answer are substantially repeated and relied on by complainant as entitling him to relief on behalf of the corporation. Of these defences the only one worthy of notice grows out of the contract of May 4th, 1872, which, it is assumed, bound the Pennsylvania Co. to pay the interest on the bonds then turned over
168 to it until the full and final completion of said road, and that, the Pennsylvania Co. being so bound, there was no default on the part of the Mansfield, Coldwater & Lake Michigan R. R. Co., as alleged by the trustees in the foreclosure suit. This defence, whether good or bad, was known to and was set up by the defendant railroad Co. in the foreclosure suit. Complainant says it was concealed from him and other stockholders, and was not discovered by him till shortly before the bringing of this suit. By whom or how concealed from him is not stated; but the time at which he acquired his knowledge of or information about said contract is not at all material. The corporation in whose behalf he institutes the present suit and whose rights he is seeking to enforce was fully aware of the existence of said contract, which was set up and relied upon as a defense in its answer to the foreclosure suit. Complainant's ignorance of its existence, however superinduced, whether by fraudulent concealment or negligence, in no way changes or affects the material fact that the corporation in whose behalf he now interposes labored under no such want of knowledge or information. The corporation whose rights this suit seeks to protect and enforce can take no benefit or advantage from the fact that complainant was ignorant of what was well known to the corporation itself, well known to one of its
169 directors and solicitor, Henry C. Hedges, who opposed the resolution of the board directing a withdrawal of the defence; but if this were not so, and if complainant's ignorance of what was known to the corporation could avail the latter in cases like the present, can it be said that complainant's want of knowledge of that contract of May 4, '72, was excusable? We think not. As a stockholder he was affected with notice of the foreclosure suit and of the result of that proceeding. He does not intimate in his bill that he did not know of its existence and of the defences interposed thereto by the company. When the property of the corporation, in which he had an interest as a shareholder, was being sold under judicial proceedings, open and accessible to his inspection and examination,

he is not in position to claim the benefit of ignorance in respect to matters within easy reach of himself and within the knowledge of his company; but aside from this, the court is by no means satisfied that the contract of May 4, '72, admits of the construction which the defendant railroad Co. in the foreclosure suit and complainant in the present suit seek to have placed upon it. Read in the light of the contract of July 20, '71, and of the supplemental mortgage executed October 1, '72, the agreement of May 4, '72, will hardly warrant the construction that the Pennsylvania Company undertook and agreed to pay interest on bonds which it was entitled to receive by virtue of its ownership of such bonds. The true meaning
170 of the contract seems to be that the Pennsylvania Company would pay the interest on all such or so many of said bonds as might be used and to which it was not entitled under said contract of July 20, '71. The interest to which it was then or should thereafter be entitled upon bonds earned under said contract was not to be paid by it. Such an interpretation would be unreasonable; but it might well assume to provide for the interest on said bonds before its own right to the interest accrued, and such is the fair and rational meaning of the agreement. What became of the interest falling due prior to Oct. 1, '73, does not appear. It is not intimated or suggested in either the answer of the corporation to the foreclosure suit or in the present bill that it was not provided for by said Pennsylvania Company, or that it was paid by the Mansfield, Coldwater & Lake Michigan R. R. Co.

Again, the court found, as appears from the consent order of August 19th, 1876, to which the Mansfield, Coldwater & Lake Michigan R. R. Co. gave its written assent, that the Pennsylvania Railroad Company, a corporation separate and distinct from that of the Pennsylvania Company, was the owner and holder of said outstanding bonds and of the past-due coupons from Oct. 1, '73. Assuming that such was the fact, was the Pennsylvania Railroad Co., as such holder and owner, bound to look to the Pennsylvania Company for payment of such interest under the contract of May 4, '72, between the latter and the M., C. & L. M. R. R. Co.? This will hardly be insisted upon. The contract of May 4, '72, if it went to the extent claimed for it by the bill, being only between the Mansfield, Coldwater and Lake Michigan R. R. Co., and the Pennsylvania Company, might
171 be binding between themselves, but would certainly not require the owner and holder of the bonds and past-due interest to look to the liability of the Pennsylvania Company thereunder before resorting to the makers and the mortgages executed to secure the payment of his bonds and interest on the same accrued. The suggestion of the bill that Thomas A. Scott was the president and had the practical control of both the Pennsylvania Company and the Pennsylvania Railroad Company is not material. If the bonds had been fraudulently issued within the knowledge of said Scott, his knowledge might have operated as notice to the latter company when it acquired the bonds. But the case made by the bill and the defence set up in the answer of the railroad company to the foreclosure suit does not present the question of a fraudulent

issue of bonds, so as to put the holder upon proof of purchase before maturity for value and without notice; but the defence was and is want of complete and full consideration paid or given therefor by the Pennsylvania Company under the contract of July 20, '71, which it is claimed was not fully performed by said company. It is conceded in the answer of the railroad company in the foreclosure suit that said Pennsylvania Co. put about 47 miles of road in condition for the passage of trains, and that it pretended to place the iron and rails upon about 75 miles of the line of said railway. It is claimed that this was not properly done; that the iron was of inferior quality, the road was not properly ballasted, &c. These facts, if true, might have justified and warranted a counter-claim for damages for breach of contract on the part of the Pennsylvania Co.,
172 but they do not impeach or tend to impeach the validity of the bonds in the hands of the Pennsylvania Railroad Company, who, in the absence of fraud in the issuance of the bonds, is presumed to be an innocent holder for value and before maturity.

Again, the contract of July 20, '71, imposed certain duties and obligations upon the Mansfield, Coldwater and Lake Michigan R. Ry. Co. in respect to preparing and getting the road-bed, &c., ready for the iron. It is not averred in said company's answer to the foreclosure suit, nor in the present bill of complainant, that said undertakings on the part of said M., C. & L. M. R. R. Co. were complied with, so as to show that the Pennsylvania Company was in default on its part. So that want of consideration for the $1,600,000 of bonds placed in the hands of the Pennsylvania Company under that contract and which it claimed to have earned in the building of 75 miles of said line of railway, is not well pleaded even as against the Pennsylvania Co., while in respect to the Pennsylvania Railroad Co., to whom the bonds were transferred and by whom they were held when the mortgages were foreclosed, the facts presented constitute no defence.

Now, aside from the statements of the company's answer to the foreclosure suit, largely repeated and relied upon in the present bill, what new and extrinsive facts are alleged? There is, first, the allegation that the resolution of the board of directors of Nov. 3, '76, directing the solicitors of the company to make no further defence to the foreclosure suit, was fraudulent. How and in what way fraudulent is not disclosed, except in the most vague and general way. As to Henry C. Lewis and Joseph Fisk, two of the directors of the
173 M., C. & L. M. R. R. Co. when said resolution was passed it is stated that they were also directors in the Coldwater, Marshall and Mackinaw Railroad Company, to which said Scott & Cass were to give a large portion of the property of said defendant, The Mansfield, Coldwater & Lake Michigan R. R. Co., to induce said directors to favor a withdrawal of said answer and defence. It is not suggested how Scott and Cass, as trustees, could give to another corporation a portion of the trust property then being foreclosed. It is not intimated that any such arrangement was carried out. It is not charged that Lewis & Fisk, in voting for the resolution, acted upon the inducement so held out to them, which looked to some

benefit to another road in which they were directors, nor is it alleged that they held a larger interest in the latter road than in the M., C. & L. M. R. R. Co. Corrupt action on their part is barely insinuated, not charged. If this intimation of corrupt action on the part of Lewis & Fisk was based on the provisions of the consent order of August 19th, 1876 (as was suggested at the hearing of the demurrer), it is manifestly not well founded. By the terms of that order the ties and rails which were allowed to be removed from one part of the line and relaid upon another were to be used by the Coldwater, Marshall & Mackinaw R. R. Co. only until the termination of the foreclosure suit or not beyond the sale of the M., C. & L. M. R. R. Hence there was no advantage to the C., M. & M. R. R. in Lewis & Fisk withdrawing defence and allowing an early sale. On the contrary, the interest of the C., M. & M. R. R. Co. was in postponing the sale. It is said that Reuben F. Smith, George W. Layng,
174 and Frank Janes, three other directors of the M., C. & L. M. R. R. Co., were employés of the Pennsylvania Company, and, acting in the interests of said company, voted for the resolution of Nov. 3, '76. This does not charge fraudulent and corrupt conduct on their part; but it is said that said action of the board was "solicited" by Thomas A. Scott in the interest of said Pennsylvania Co., and that J. Twing Brooks, in the same interest, being both a director in the M., C. & L. M. R. R. Co. and the general attorney of the Pennsylvania Company, favored said resolution and aided in securing its adoption. That is no sufficient allegation of corrupt and fraudulent action and conduct on his part. The bill nowhere intimates or charges that the directors voting for said resolution did so with the knowledge or belief that the facts set up in the company's answer were true, or that they constituted a valid and proper defence to the foreclosure suit. It is not intimated either that they derived any personal benefit from their action. Both the trustees and several of the directors who participated in said transaction have since departed this life, and in calling their actions in question in a way to impute turpitude and breach of trust, something more is required than vague generalities and insinuations. No specific acts are charged. No specific facts are stated which fairly or by necessary implication make or render the action of the board of directors in withdrawing said defence corrupt or a breach of duty. It is not sufficient, in general terms, to allege on information and belief "that the withdrawal of said defence was the fraudu-
lent act of said Thomas A. Scott and J. Twing Brooks,
175 aided and abetted by such of said directors as voted in favor of said withdrawal." There was no concealment of this action, and, after its adoption, there was ample opportunity before the final decree for complainant or any other stockholder to have intervened and made defence. Every fact alleged in the bill upon information and belief was then disclosed by the record in said foreclosure suit or otherwise readily accessable to complainant upon the slightest inquiry or investigation. Under such circumstances and conditions, if it be conceded that a fraud was actually committed against the corporation, the question next arises whether

the company or the complainant, who seeks to assert *its* right, has not been guilty of such "laches" as to bar his or its right to any relief.

The allegations of the bill in reference to the concealment of the frauds or fraudulent acts relied on for relief are wholly insufficient to have arrested the running of the statute of limitations, in analogy to which courts of equity generally act in considering and testing the question of "laches," in seeking relief. In Wood *vs.* Carpenter, 101 U. S., p. 143, it is said by Mr. Justice Swayne, speaking for the court, that "concealment by mere silence is not enough; there must be some trick or contrivance intended to exclude suspicion and prevent inquiry; there must be reasonable diligence, and the means of knowledge are the same thing in effect as knowledge itself, and the delay which has occurred must be shown to be consistent with the requisite diligence." This rule was repeated and applied by the supreme court in the equity suit of National Bank *vs.* Carpenter, 101 U. S., p. 567. It is sug-
176 gested by counsel for complainant that the rule announced and applied in Wood *vs.* Carpenter, 101 U. S., 138 to 143, which clearly establishes the insufficiency of the present bill, is not in harmony with Bailey *vs.* Glover, 21 Wallace, 336, which has been recognized in the later cases of Rosenthal *vs.* Walker, 111 U. S. 185; Traer *vs.* Clews, 115 U. S., 528–538, and Kirby *vs.* Lake Shore R. R. *et al.*, 120 U. S., p. 130–139; but in respect to what will constitute the concealment of a fraud, such as will arrest the running of the statute or excuse delay in seeking relief because of such fraud, no conflict is perceived between the decisions in their application to the facts of the present case. In Bailey *vs.* Glover, 21 Wallace, p. 347, Mr. Justice Miller says: "In suits in equity, where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief, provided suit is brought within proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it, without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." All the authorities agree in the proposi-
177 tion that the party seeking to excuse his delay in asking relief on the ground of fraud must show that his ignorance was not negligent; that he remained ignorant without any fault of his own; that he could not by reasonable diligence have discovered the fraud sooner, and "that where the means of knowledge are open to him he is chargeable with knowledge from the date when he should have ascertained the facts." Now, testing the complainant's bill by these rules, it is clearly insufficient to excuse the long delay that has elapsed since

rendition of the decree, in 1877, till the commencement of the present suit, in 1887. It is not alleged that during the 10 years of delay that the corporation whose rights are sought to be enforced was ignorant of the alleged fraud committed against it. It is not charged that the complainant's ignorance of the alleged frauds was "produced by affirmative acts" of the guilty parties in concealing the facts from him or other stockholders.

It is not stated that during this long period the complainant ever made or caused to be made the slightest inquiry in relation to the transactions now complained of. The facts were all either matters of record in the foreclosure suit or readily accessible upon inquiry. He could have learned in 1877 (if he did not then know) as easily as in 1887 the relation which Scott & Brooks and the directors, Smith, Layng, and Janes, bore to the Pennsylvania Company and which Lewis and Fisk bore to the Coldwater, Marshall and Mackinaw R. R. Co. The resolution of the board of directors of Nov. 3, '76, was made a matter of record in the foreclosure suit. Two of the directors within easy reach of complainant had protested
178 against that action, and in its answer the company had set up all the defences now relied on by the complainant in its behalf. Under such circumstances complainant's ignorance, even assuming that his ignorance would excuse delay on the part of the corporation, was negligent. It was not without fault on his part. It is also manifest from the situation of the parties and the history of the transaction, as stated by himself and as disclosed in the contracts and foreclosure proceeding, that by reasonable diligence he could have discovered all the alleged fraud sooner; that the means of knowledge were open to him from 1877, and that he must be chargeable with knowledge from the date when he should have ascertained the facts. But the case is far stronger as against the corporation, as to whom it is not alleged that it was during any period of time ignorant of any of the facts now set up as a ground of relief.

Under the facts and circumstances of this case as disclosed by the bill, even assuming the existence of the frauds alleged, such "laches" are shown as should, in the judgment of the court, defeat the relief sought. This objection to the bill may be taken by demurrer. Thus, in Lansdale *vs.* Smith, 106 U. S., 391, it was held that a bill is bad on demurrer when it appears therefrom that there has been "laches" in operating the rights which it seeks to enforce. The bill in the present case is, upon its face, open to this objection. It presents no sufficient excuse for the delay that had elapsed and, tested by the decisions of the Supreme Court, it must be held bad and not sufficient to entitle complainant to the relief sought. See—

Moore *vs.* Hawkins *et al.*, 19 Howard, 69.
179 Burke *vs.* Smith, 16 Wallace, 390–401.
U. S. *vs.* Throckmorton, 98 U. S., p. 64 to 69.
Sullivan *vs.* Portland Railroad, 94 U. S., 804.
Godden *vs.* Kimmell, 99 U. S., 201.
Wood *vs.* Carpenter, 101 U. S., 139–143.
Coddington *vs.* Railroad Co., 103 U. S., 409.

In this last case relief was sought eight years after sale, and was denied because of "laches" and the statute of limitations.

Again, the present bill is defective in not showing any valid defence to the foreclosure proceeding which is sought to be opened. As already indicated, the answer which the corporation filed in that suit showed that the Pennsylvania Company had in fact earned a considerable portion of the bonds placed in its hands; that it had equipped, under the contract of July 20, '71, from 47 to 75 miles of the M., C. & L. M. R. R. Co.'s line of railway, for which it was entitled to bonds to the extent of $20,000 per mile. It is not pretended in said answer or in the present bill that the M., C. & L. M. R. R. Co. ever paid the interest on said bonds or provided the sinking fund required by the mortgages thereon. To the extent of such defaulted interest, sinking funds, and bonds, which the holder had the right to treat as due, the trustees in the foreclosure suit were clearly entitled to a decree for the benefit of the Pennsylvania Railroad Co. It is reasonably certain that the amount so due the Pennsylvania Railroad Company as the holder and owner of said bonds exceeded the minimum price placed upon the road in the decree, and for which it was sold. The present bill neither negatives this fact nor offers to pay the sum so due. It shows no valid
180 defense to the bonds so earned by the Pennsylvania Co. and which afterwards passed into the hands and ownership of the Pennsylvania Railroad Company. It is nowhere denied that the M., C. — L. M. R. R. Co. accepted the work done by the Pennsylvania Co., and that the bonds were to be given for the work so done. To this extent, then, there was a valid cause of action, which entitled the trustees to enforce the mortgages of Oct. 1, '71, and Oct. 1, '72. This equity and lien is in nowise affected by anything appearing in the company's answer to the foreclosure suit or in the averments of the bill under consideration. The decree, to that extent, could not or would not have been reversed on a direct appeal, as held by the Supreme Court in Thomas *vs.* Brownville R. R. Co., 109 U. S., p. 525. The rule *as* well settled that when the decrees of courts possessing jurisdiction of the parties and subject-matter of the litigation are sought to be opened or vacated, merits must be shown; that the party seeking such relief must show the existence of a valid defence, which he has been prevented from asserting because of the fraud or misconduct of the successful party. The Pennsylvania Railroad Company, for whose benefit, as the holder and owner of the bonds, the foreclosure suit was prosecuted, is not charged with any fraud or misconduct, nor is any case made by the bill showing that it was not entitled to that decree.

By complainant's amended bill, filed herein on the 24th Febr'y,
1888, it is alleged that the mortgage or trust deed of Oct. 1, '72, was, after its execution and delivery, altered and changed in
181 a material way by erasing therefrom a reference made to the contract of May 4, '72; that mortgage was filed as Exhibit B to the foreclosure suit. The company executing it had full opportunity to examine it and discover any changes or alterations made therein as alleged, but in its answer it made no such claim. The

court is unable to see how this fact, if true, can or could have effected the rights of the parties under the mortgage of Oct. 1, '71. The trustees, if the alleged alterations were made, did not conceal the fact from the corporation. They exhibited the mortgage with the bill, and the corporation made no point on its having been altered or changed. The complainant now invoking the aid of this court in behalf of that corporation, which knew or could have known the alleged fact in 1876 by simple inspection of the instrument brought directly to its attention, comes forward too late with such a complaint.

The suggestion that the answer of the M., C. & L. M. R. R. Co. having been withdrawn under the resolution of Nov. 3, '76, was not thereafter notice to the complainant and other stockholders, need hardly be dwelt upon. The answer remained on file and is certified by the clerk of this court as a part of the record in the foreclosure suit, which is made a part of complainant's bill; but, aside from this, the answer of Swan, Rose and Co. set up precisely the same facts and defences as the answer of the M., C. & L. M. R. R. Co., and an inspection of that answer would have disclosed to the corporation and its stockholders all the material facts set up and relied upon in the present bill relating to the contract of May 4, '72, which constitutes

to main grounds for the relief now sought.

182 After a careful examination of the matters, the conclusion of the court, upon the whole case, is that the demurrers to the bill should for the reasons above stated be sustained. It is accordingly so ordered, and that the complainant's bill be, and the same is hereby, dismissed at his costs.

August 24, 1888.

HOWELL E. JACKSON,
Circuit Judge.

183 & 184 And afterward, to wit, on the 24th day of September, 1888, an entry was entered in the journal in this cause, and which is in the words and figures following, to wit:

CHARLES FOSTER *et al.*
vs.
THE MANSFIELD, COLDWATER AND LAKE MICHIGAN R. R. Co. *et al.* } Chancery. No. 4548.

This cause having come on to be heard upon the demurrers filed to the bill of complaint in this cause, and having been argued by counsel, and due consideration having been given by the court, it is now ordered and decreed that the said demurrers be sustained, and that the said bill be dismissed at complainants' costs, to be taxed at $—, for which execution may issue.

And thereupon came the complainants and pray the allowance of an appeal to the Supreme Court of the United States; which said appeal is allowed upon complainants giving bond in sum of $500, conditioned as required by law.

185 Know all men by these presents that we, Charles Foster, as principal, and John H. Doyle, Chas. T. Lewis, and Jno. P. Carrothers, as sureties, are held and firmly bound unto The Mansfield, Coldwater & Lake Michigan R. R., The Pennsylvania Railroad, J. Twing Brooks, *et al.* in the sum of five hundred dollars; to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this — day of ——, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas the above-bounden Charles Foster, for himself and others, has appealed to the next Supreme Court of the United States from a decree of the circuit court of the United States for the northern district of Ohio, eastern division, bearing date the 25th day of September, A. D. 1888, in a cause wherein the said Charles Foster, for himself and others, was complainant and the said Mansfield, Coldwater and Lake Michigan R. R. *et al.* were respondents:

Now, therefore, the condition of this obligation is such that if the above-named appellant, Charles Foster, shall prosecute his appeal with effect and pay all such damages, costs, and expenses as shall be awarded against him as such appellant therein, then this obligation to be void; otherwise to remain in full force and effect.

CHARLES FOSTER. [SEAL.]
CHAS. T. LEWIS. [SEAL.]
JOHN H. DOYLE. [SEAL.]
JNO. P. CARROTHERS. [SEAL.]

Sealed and delivered in presence of—

WILLIAM M. DAY.

[Endorsed:] No. 4348. In the circuit court of the United States for the northern district of Ohio. Charles Foster *et al. vs.* The Mansfield, Coldwater & Lake Mich. R. R. *et al* Appeal bond. Approved and filed October 10, 1888. M. Welker, dist. judge.

186 THE UNITED STATES OF AMERICA, }
Northern District of Ohio, Eastern Division, } *ss:*

I, Augustus J. Ricks, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the case wherein Charles Foster, for himself and others, is complainant and The Mansfield, Coldwater and Lake Michigan Railroad Company, The Northwestern Ohio Railroad Company, The Pennsylvania Company, The Pennsylvania Railroad Company, George W. Cass, Reuben F. Smith, J. Twing Brooks, George W. Layng, Frank Janes, F—— A. Gorham, Henry C. Hedges, and Stephen B. Sturges are the defendants, as the same appears from the files and records of said court now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Cleveland, in said district, on this 16th day of October, A. D. 1888, and of the Independence the 113th year.

Seal of the Circuit Court, North'n Dist. of Ohio.

AUGUSTUS J. RICKS, *Clerk.*

Endorsed on cover: Case No. 13,385. N. Ohio C. C. U. S. No. 266. Charles Foster, appellant, *vs.* The Mansfield, Coldwater & Lake Michigan Railroad Company, The Pennsylvania Railroad Company, *et al.* Filed October 18, 1888.

145 U.S. 88

Office Supreme Court U. S.
FILED.
MAR 14 1892
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

CHARLES FOSTER,
For himself and others,
Appellant,

—*vs.*—

The Mansfield, Coldwater & Lake Michigan Railroad Company; The Northwestern Ohio Railway Company; The Pennsylvania Company; The Pennsylvania Railroad Company; George W. Cass, Reuben F. Smith, J. Twing Brooks, George W. Layng, Frank Janes, F. A. Gorham, Henry C. Hedges and Stephen B. Sturges,
Appellees.

} IN EQUITY.

BRIEF FOR THE APPELLANT.

JOHN H. DOYLE.

BARKDULL PRINTING HOUSE, TOLEDO, O.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Cleveland, in said district, on this 16th day of October, A. D. 1888, and of the Independence the 113th year.

Seal of the Circuit Court, North'n Dist. of Ohio.

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Appellees.

} IN EQUITY.

BRIEF FOR THE APPELLANT.

JOHN H. DOYLE.

ASSIGNMENT OF ERRORS.

1.—The court erred in sustaining the demurrers to the bill and amended bill.

2.—The court erred in not overruling said demurrers and each of them.

3.—The court erred in dismissing the complainant's said bill.

4.—The court erred in dismissing said bill, upon sustaining said demurrer, without giving complainant an opportunity to amend said bill.

5.—The court erred in rendering judgment against said complalnant that said bill be dismissed at complainant's costs.

JOHN H. DOYLE,
Solicitor for Complainant.

STATEMENT OF FACTS.

The Mansfield, Coldwater & Lake Michigan Railroad Company was a corporation under the laws of Ohio and Michigan. It was organized for the purpose of constructing and operating a railroad from Mansfield, in the state of Ohio, to Allegan, in the state of Michigan.

Its capital stock was 4,000,000, and for the purpose of securing a loan of money, which it sought to make for the purpose of constructing its said railroad and equipping the same, it made a mortgage or deed of trust to George W. Cass and Thomas A. Scott, as trustees, to secure 4,460,000 of its bonds.

We do not deem it necessary now to discuss the ordinary duties and obligations of trustees under a deed of trust or mortgage, like the present. At the time of making this deed of trust, Thomas A. Scott was the president of the Pennsylvania Company, a Pennsylvania corporation, and of the Pennsylvania Railroad Company, also a Pennsylvania corporation, which corporations are practically the same, controlled by the same parties, and operated in the same interest.

In July, 1871, the said Mansfield, Coldwater & Lake Michigan Railroad Company entered into a contract with the Pennsylvania Company (Exhibit "B" to the bill) for the purpose of procuring the laying of the rails and track, and the equipment of said road, by terms of which the said Mansfield, Coldwater & Lake Michigan Railroad Company were to procure the right-of-way, grade the same, and deliver the ties on the line of road, and to build the necessary bridges, doing the grading and furnishing the ties for the same, and preparing the road-bed for the track, and to deliver to the said Pennsylvania Company $20,000 of bonds, secured by the deed of trust aforesaid, for each mile of track laid by the said Pennsylvania Company, and an amount of common

stock equalling in the aggregate $5,000 more than all other stock issued by the said company, and to deliver the said bonds and stock to the trustees, as trustees, for delivery to the Pennsylvania Company as fast as material was delivered to the value thereof, and in full, as each ten miles of track was laid, and the track in condition for the passage of trains.

For the actual expenditures of the Mansfield, Coldwater & Lake Michigan Railroad Company, at cash values, including the right-of-way and grants by it obtained, preferred stock was to be issued, which should be entitled to dividend equal to 7 per cent. out of the net earnings of the road, that to be the only stock issued except the common stock above referred to. In consideration whereof the Pennsylvania Company agreed to provide the iron, chairs and spikes, to ballast and lay the track and sidings over and upon the railroad, to fence the same, to build depots, station houses, water houses and all other necessary buildings, to place the railroad in first-class condition for traffic, together with certain other stipulations on its part to be kept and performed. The whole line to be equipped by the Pennsylvania Company as a first-class railroad, with provisions in the contract for the disposition of the earnings of the road resulting from its operation. (For full particutars of this contract, reference is made to "Exhibit B" of the bill).

It was the scheme and purpose of this contract to procure the completion, at a speedy date, of the railroad

from Mansfield, in Ohio, to Allegan, in Michigan. Under this agreement the Pennsylvania Company was not entitled to the possession of the $20,000 per mile of the bonds, except for the payment of actual expenses incurred, and in full only as each ten miles of road was completed ready for operation. The Pennsylvania Company has never completed the railroad, but it obtained the possession of the entire issue of bonds. It did this by virtue of the contract "Exhibit C," of the bill dated May 4th, 1872. Under that contract W. S. Hickox, the president of the Mansfield Company, delivered to the trustees, Cass and Scott, the entire $4,460,000 of bonds. In consideration of which delivery of the bonds before the iron is laid, the Pennsylvania Company obligated itself to take care of and pay all interest which might mature prior to the Mansfield Railroad being in a condition for traffic. In view of the other contracts, this means the entire line of railroad from Mansfield to Allegan being in condition for traffic, for the contract provides as follows: "And for all interest so paid by the Pennsylvania Company and not justly and equitably chargeable thereto under said contract of July 20, 1871, said Pennsylvania Company shall be reimbursed out of the earnings of the said Mansfield, Coldwater & Lake Michigan Railroad Company, after the same shall be completed in sections under said contract, and begin to make earnings on the respective sections as required by the terms of said agreement." The Pennsylvania Company thereby obtained the possession of the bonds without having complied with any part of this contract of July 20, 1871.

In some manner the Pennsylvania Company also obtained possession of one and one-half million dollars of the capital stock of said Mansfield Company, to which it was not entitled under the contract of July 20, 1871. This stock being a majority of the stock issued by the company, gave to the Pennsylvania Company the control of its affairs, and from that date up to and after the date of the sale, the Pennsylvania Company controlled all of the corporate acts of the said Mansfield Company. At this point the Pennsylvania Company had for its chief executive officer, Thomas A. Scott, who was also one of the trustees under the trust deed. It had control of the Mansfield Company, and this same man influenced the action of the Pennsylvania Company, the Mansfield Company, and the trustees of the mortgage.

The bill alleges that when the Pennsylvania Company became possessed of this stock it had not become entitled thereto; it had earned no part thereof, and it never had performed any part of this contract that would entitle it, or authorize it, to exercise the rights of a stockholder, or the voting power which said stock gave them.

This being the situation, on the 20th day of January, 1876, Scott and Cass, as trustees, filed in this court their bill of complaint, praying for the foreclosure of the mortgage and the sale of the property, basing their right to maintain the bill upon the alleged failure of the defendant company to pay the interest on the mortgage bonds aforesaid. The interest which the company failed to pay was the interest which the Pennsylvania Company

obligated itself to pay by the contract of May 4, 1872. The Pennsylvania Company were the sole holders of the bonds, and the only person in whose interest the trustees could be called upon to act. Scott, the trustee, was the president of the Pennsylvania Company, and, as alleged in the bill, controlled and dictated its policy.

The defendant company in that suit filed an answer, a copy of which is attached to the present bill as a part of the record of that suit, and marked "Exhibit D" of the bill, It denied the material allegations of the bill, and set up a complete defense to the suit. *But this defense was never permitted to receive the attention of the Court, or to be read in support of the defendant company, but it was withdrawn on the 3d of January, 1877, and a decree pro confesso was entered March 21, 1877, in favor of the complainants and against the defendants, and during the April term of 1877, a decree of sale was entered, and in August, 1877, the entire property of the defendant company was sold to the Pennsylvania Company, through its trustee, Joseph Leslie, and the property passed into the possession of the Pennsylvania Company.* The only disposition of the proceeds of the sale being the application thereof upon the bonds held by said Pennsylvania Company, no part thereof being applied to the payment of any debt or liability owing by the defendant company. And all this was with the knowledge, aid and co-operation of Cass, the co-trustee of said Scott, under the trust deed.

The solicitor, who had active charge of these pro-

ceedings, was the general solicitor of the Pennsylvania Company, the legal adviser of the trustee, the solicitor of record of the complainants in the bill, the solicitor of the Pennsylvania Railroad Company, and a director in the defendant, the Mansfield Company. Having obtained the stock unlawfully, as alleged, the said Scott, the Pennsylvania Company and the solicitor aforesaid, procured the election as directors of employes of the Pennsylvania Company in the board of the Mansfield Company—so put into the board of the Mansfield Company by virtue of the unlawful power obtained by the possession of the stock aforesaid, unlawfully issued, and for the purpose of acting in the interest of the Pennsylvania Company, and to the destruction of the interests of the defendant company. The same man who signed the contract of May 4th, 1872, for the Pennsylvania Company, as its president, prosecuted this action growing out of his own default, as the alleged default of the Mansfield Company.

A meeting of the board of directors of the Mansfield Company was called, and a proposition submitted to it by the solicitor for the Pennsylvania Company and the trustees, instructing their attorneys to withdraw the defense which had been made by the answer aforesaid, and the tools of the Pennsylvania Company acting under instructions from their masters, voted in favor of the resolution, Hedges and Sturges alone voting "no," and entering their protest on the record.

The bill further discloses the existence and the suc-

cessful termination of a conspiracy, fraudulent in its conception, fraudulent in its performance, and working wrong and injury in its results; it shows that Thomas A. Scott, as one of the aforesaid trustees, and as one of the complainants in the said foreclosure proceeding, did, with the assistance, knowledge and active co-operation of his said solicitor, J. Twing Brooks, and through the aid and support of Reuben F. Smith, George W. Layng and Frank Janes, enter into a conspiracy with Henry C. Lewis, the president of the defendant company, and one Joseph Fisk, a director of said defendant company, whereby the said Lewis and Fisk, upon promises of large rewards made to them by said Scott, were, at the aforesaid meeting of the board of directors called for the purpose, induced to vote for the withdrawal of the answer theretofore filed on behalf of the said defendant company in said proceeding, and to interpose no further defense therein. The bill shows that the rewards promised by said Scott to said Lewis and Fisk were to be paid out of the property of the defendant company.

Now in all these proceedings, both in the court and out of the court, the bill alleges that the existence of the contract ("Exhibit C") whereby the Pennsylvania Company obligated itself to pay the interest on the bonds which had been wrongfully delivered to them, and which they had not earned, was *purposely* and *fraudulently* concealed from the court and from the stockholders; and its existence, the bill alleges, was not known until shortly before the commencement of the

present suit. Well might the court grant a decree in the absence of any defense and without knowledge that the complainants were carrying out a scheme whereby they were getting the property of the defendant company absolutely, because of *their own default* in fulfilling the obligations of their own contract. The withdrawal of this defense was at the request of Scott, the president of the Pennsylvania Company, who held the bonds, Brooks, his solicitor, and the solicitor of the company, and the employes of the defendant company, who had been thrust into the board of directors of the defendant company for the purpose of throttling any attempted defense defendant might make, aided and abetted by Lewis, the then president of the Mansfield Company, and further aided and abetted by two of the directors, who for a consideration, as avered on page 13 of the bill, corruptly acted with them in the fraud upon the stockholders of the Mansfield Company.

The bill sufficiently alleges that no one else was interested in the bonds, or the stock aforesaid fraudulently issued, or in the purchase of the property, except the Pennsylvania Company, and that if the Pennsylvania Railroad Company, a separate organization of the same men, had any interest in either the bonds or the property, as it was officered by the same men, had the same president and the same solicitor, who were the active minds in the scheme, they obtained their interest with full knowledge of all the facts. The result of this proceeding is, that the Pennsylvania Company caused to

be organized the Northwestern Ohio Railroad Campany, and vested in it the title to so much of the property of the Mansfield Company as lies between Mansfield and Tiffin, for the purpose of given the Pennsylvania Company a line and inlet into the city of Toledo in connection with the general line of railway. The Northwestern Ohio Company being but another organization controlled by the same men and in the same interest. This property, which it obtained, and has been operating as a part of its system of railroads, and to which it has no other title than that obtained by the decree and sale, has been a large source of revenue to the beneficiary of this fraud. The Pennsylvania Company claims title to the road bed, which has been practically graded, and to the right of way from Mansfield to Allegan, a distance of about 230 miles; portions of it, it has sold, the Pennsylvania Company deriving large revenue from such sale; and it proposes to sell and dispose of the railroad from Tiffin to Allegan for its own benefit, thus depriving the stockholders and those interested in the Mansfield Company of all interest therein.

The bill alleges that all of the facts were known to the Pennsylvania Company, the Pennsylvania Railroad Company, Scott and Cass, trustees, Brooks, the solicitor, and all of the directors who participated in the scheme aforesaid, and each and all of them conspired to keep such knowledge from the stockholders, and some of the directors of the Mansfield Company. This knowledge was concealed from some of the directors and from the

stockholders, other than the Pennsylvania Company, by the active participation and co-operation of the parties engaged in the scheme. That the complainants, whom he represents, were ignorant of the facts, is sufficiently alleged. The records of the company were kept out of their reach. No meeting of the stockholders was ever called after January, 1874. No election of directors, and no notice by the officers of the company of an election, was ever given after that date. The stockholders knowing nothing of the facts, being misrepresented by the trustees, *believed the decree of sale to be final;* that the property of the company was all sold; the company itself insolvent; and this belief being brought about by the acts of the alleged conspirators, the stockholders were *deceived* into a position of inaction. They had no means of obtaining the information which the bill now discloses until accidentally a copy of the contract of May 4th, 1872, was shown to the complainant, when he at once instituted such investigation as led to the filing of the present bill; and he avers that had he known it earlier, or if he had had the means of earlier information, he would have instituted the necessary examination, and brought the necessary suit to annul and set aside the proceedings then fraudulently had.

The supplemental mortgage had been fraudulently altered by striking out all reference to this contract of May 4th, after the mortgage was executed. The allegations of our amended bill as to the supplemental mortgage, of course, only adds to the alleged fraud, and

takes that out of the case so far as it has any bearing on the decree sought to be set aside; and while these allegations are admitted by the demurrer, it makes a case which clearly shows a determined purpose, from its date, to conceal the facts from the stockholders, and to obtain the property without consideration.

The amended bill, however, gives in greater detail the reasons why the complainant could not, with reasonable diligence, have discovered the facts sooner, and gives affirmative acts of concealment by defendants, which prevented such discovery.

POINTS.

We shall try to maintain in this argument the following propositions:

1.

That the Circuit Court had jurisdiction to hear and determine the matters presented by the bill, regardless of the citizenship of the parties, and as a part of the jurisdiction in the original suit.

2.

That the complainant, as a stockholder, may maintain this suit, the corporation or the directors upon his request so to do having failed and refused; the interest of

the corporation and the rights of the shareholders in the corporate property being involved.

3.

That the action of the directors being fraudulent and in collusion with the other defendants, and tending to destroy the corporation and the rights of the stockholders in the corporate property, the stockholder may maintain a suit or defense on behalf of the corporation, even against the will of the directors.

4.

That being so, under the circumstances shown by the bill in this case such stockholders are not chargeable with notice or knowledge of any fact complained of, by by reason of such notice or knowledge being possessed or had by the directors who are charged with the commission of the fraudulent acts.

5.

That while such actions by the stockholders are in the interest and to assert some right of the corporation, it is not true that the corporation and the directors charged with the fraud are, within the meaning of this rule, synonymous, and hence knowledge of the fraud by the directors committing it is not knowledge of the corporation, which will be imputed to the stockholders in a suit brought to annul the fraudulent act.

6.

That under the allegations of this bill, which are admitted by the demurrer, it does not appear that the

complainant was guilty of such laches as will bar him or his associates from relief in a court of equity, and there is no statute of limiations which constitutes such bar.

7.

That the defendant, the Pennsylvania Company, having placed its paid employes in the control of the board of directors of the Mansfield Company, by reason of holding a majority of the stock of the latter company, wrongfully obtained, and while it had a suit pending against that company to which a valid defense had been interposed, and then procuring the board thus constituted, to withdraw the defence up to that time made, whereby it was enabled to obtain a decree which resulted in its becoming the owner of all the property of the Mansfield Company, will be held to be a trustee of the property thus obtained, for the benefit of the Mansfield Company and its shareholders.

8.

That the action of the directors in such case will be presumed to be fraudulent, and if not conclusively so, without inquiry into their motives, at least will, in the in the absence of clear proof on their part, or on the part of those claiming any benefit therefrom, of its absolute fairness and honesty, be treated as void as to the corporation whose directors they were, and its shareholders.

9.

That while the parties connected with such a transaction are still in the possession of the property obtained

through it, and no rights of third parties, without notice, have intervened, the courts will not refuse relief upon any strained application of the rule that applicants for equitable relief should be prompt in applying for it.

10.

That the stockholders were not bound to suspect their directors of fraud, not bound to examine the records of either the corporation, or the court to ferret out fraud, but had a right to rely upon the acts of the directors being honest and solely for the best interest of the corporation, and were not required to make any inquiry until some fact came to their knowledge which indicated bad faith on the part of the directors.

11.

That time, whether under the statutes of limitations, or the equitable bar because of staleness, in a case of fraud, will not commence to run until the discovery of the fraud, and in a case of this kind, where the directors of a corporation are charged with participation in the fraud to the injury of the corporation, it is not necessary to allege or prove that any active steps were taken or resorted to by the directors to conceal knowledge of the fraud from the stockholders. It is sufficient that the fraud was committed, that it was not known to the shareholder, and that he was not negligently ignorant.

12.

That under the circumstances disclosed in this case, to hold that the stockholder, in instituting a suit to undo

the fraud, can maintain it only in the right of the corporation, and that the board of directors are the corporation, and that knowledge of the fraud on the part of the corporation is imputed to the shareholders, and that knowledge of the fraud by the directors committing it is knowledge by the corporation, and hence imputed to the shareholder, and that on that knowledge can be based the doctrine of ratification, or laches, or the application of the statute of limitations, on behalf of the party of the fraud who received and is still enjoying its fruits, is worse than absurd because it is wicked.

13.

That there never was any trial, or submission to the court, or determination by the court, of the issues in the the foreclosure suit, will not be disputed. That the trial of such issues was prevented by the complainants therein and the real party in interest, by collusion with the directors of the defendant, who were made directors for that and other purposes of the Pennsylvania Company, can not be disputed under the demurrer filed herein. That the case therefore comes clearly within the principles announced by this court in

Pacific Railroad of Mo. vs. Missouri Pacific Railway Co., 111 U. S. 505;

United States vs. Throckmorton, 98 U. S. 61;

And other cases hereafter cited.

14.

That on the question of laches, staleness, knowledge, ratification, under the allegations of the bill, the case is

brought clearly within the principles announced in two cases last above cited, and the following, among others which will be referred to hereafter:

Bailey vs. Glover, 21 Wallace 342;
Rosenthal vs. Walker, 111 U. S. 185;
Traer vs. Clews, 115 U. S. 528;
Kirby vs. Lake Shore R. R. Co., 120 U. S. 130;
Kilbourn vs. Sunderland, 130 U. S. 505;
Bryan vs. Kales, 134 U. S. 126.

15.

That the sustaining of a demurrer to this bill, which demurrer is interposed by the party charged with the fraud and now in the full enjoyment of the property of the defrauded company, was error, and the judgment of the Circuit Court should be reversed.

Other matters, like the construction of the contract of May 4, 1872, the failure to provide a sinking fund, and the like, will be briefly discussed.

JURISDICTION.

This is a proceeding to set aside a decree of this court, obtained as the bill alleges, by fraud. If the facts alleged in the bill are sufficient, if true, to require the interposition of a Court of Equity, then this court

has jurisdiction of this suit without reference to the residence of the parties.

It was held in the *Pacific Railroad of Missouri vs. The Missouri Pacific Railroad Company et al.*, 111 U. S. 505, that the Circuit Court had jurisdiction of the bill brought to set aside a decree, on the ground of fraud, although the plaintiff and some of the defendants were citizens of Missouri. The court, on page 522, say: "Upon the question of jurisdiction, there can be no doubt that the Circuit Court, as the court which made the Ketcham decree, and had jurisdiction of the Ketcham suit, has jurisdiction to entertain the present suit to set aside that decree on the grounds alleged in the bill, if they shall be established as facts, and if there shall be no valid defence to the suit, although the plaintiff and some of the defendants are citizens of Missouri." The bill falls within recognized cases which have been adjudged by this court, aud have recently been reviewed and reaffirmed in *Krippendorf vs. Hyde*, 110 U. S. 276. On the question of jurisdiction, say the court, "the suit may be regarded as ancillary to the Ketcham suit, so that the relief asked may be granted by the Court which made the decree in that suit, without regard to the citizenship of the present parties, though partaking so far of the nature of an original suit as to be subject to the rules in regard to the service of process which are laid down by Mr. Justice Miller, in Pacific Railroad Company vs. Missouri Pacific Railroad Company, 1st McCrary, 647. The bill, though an original bill in the

chancery sense of the word, is a continuation of the former suit on the question of the jurisdiction of the Circuit Court."

See *Minnesota Co. vs. St. Paul Co., 2 Wallace, 609, 633.*

So in Krippendorf vs. Hyde, 110 U. S. 276, it was held that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, is not an original suit, but supplementary merely to the original suit out of which it has arisen, and is maintained without reference to the citizenship or residence to the parties. Mr. Justice Matthews in that case discusses the question at some length, and refers to other authorities sustaining the jurisdiction of the court.

See also *Freeman vs. Howe, 24 Howard, 450.*
Buck vs. Colbath, 3 Wall, 334.
Van Norden vs. Morton, 99 U. S., 378.
Covell vs. Heyman, 111 U. S., 179.
Wayman vs. Southard, 10 Wheaton, 1.

These authorities without further citations sustain our right to maintain the present bill, which is brought for the purpose of setting aside a former decree, and to open up the sales made thereunder, and to admit the original defendant, or its representatives, the present stockholders, to interpose the defense therein.

THE RIGHT OF THE STOCKHOLDERS TO MAINTAIN THE SUIT.

Section 659, "Cook on the Law of Stock and Stockholders," says:

"The frequent fraud on the stockholders, and one which it is difficult to detect and prove, is where the directors collusively neglect to defend against a suit brought to foreclose a mortgage on the corporate property, in consequence of which a default is taken and the corporation speedily deprived of all its assets. It is a fraud difficult to detect since ordinarily there is no defense to foreclosure suits, and the defenses which should have been set up by the corporation are difficult to prove themselves. At an early day the leading case of Koehler against Black River Insurance Company established the principle that a stockholder in such a case may be allowed to come in as a defendant, and set up the defense which a corporation ought to have set up."

Thompson on Liability of Officers and Agents of Corporations, page 382, vividly describes such transactions as follows:

"Notwithstanding the ready devices with which the courts have met such attemps, this species of roguery has grown into a science, with a distinct nomenclature. The interior organization or conspiracy, composed of the holders of a majority of the shares, bent on destroying the rights of the minority, is called a 'ring,' and the business of the conspiracy is called 'wrecking the corporation.' This process of 'wrecking.' which has been seen in many cases of railway corporations, is sometimes carried on in this way: Either the property is allowed to run down, or, under some pretext of improvement, amelioration or extension of business, it is 'bonded'—that is to say, negotiable debentures are issued, secured

by a mortgage of the corporate property. The scheme is so managed that the majority of these debentures find their way into the hands of the 'ring.' The condition of the mortgage is, that whenever default is made in the payment of the interest coupons, the mortgage may be foreclosed. This event speedily happens. One of the bondholders now files a bill in equity to foreclose the mortgage, or it is done by the trustee in the mortgage, himself the agent of the 'ring.' The corporation and the directors are named defendants. Now, the directors being in the 'ring,' the allegations of the bill are admitted in the answer which the corporation makes to the bill, and also which is made by the directors. A decree is entered 'by consent' for the sale of the property. This 'consent decree' provides that the payment of the purchase money bid at the sale may be made in the mortgage debentures. The property is sold at auction, is bid in by a member of the 'ring' for the other members, they furnishing him with a bond with which he makes payment. Another 'consent decree' is made confirming the sale. The purchases organizes a new corporation composed of himself and other members of the 'ring,' which takes possession of the property.

"Now, what has been the result of this proceeding? Simply this: To make further use of the slang in which those who engage in such transactions express themselves, all the stockholders of the old corporation not in the 'ring' are squeezed out. The property has been sold under a mortgage; the stock has become valueless. Those of the stockholders who, with the directors, are in the conspiracy, have got it all, and those who are out of it lost all. Thus the chancellor not only has not circumuented the rogue, but the rogue has made the chancellor his tool in the accomplishment of his nefarious purposes. I speak deliberately in saying this is no imaginary picture. More than one astute railroad lawyer, when he reads this, will from his own experience be compelled to admit that I have held the mirror up to nature."

The case of *Koehler against the Black River Insurance Company*, is found in 2nd Black, page 715.

A similar case is *Bayliss against Lafayette Railroad*, 8th Bissell, page 893, and in *Musinna against Goldthwaite*, 34 Texas, 125, where there had been a fraudulent foreclosure suit instituted, the intervenor claiming in interest was permitted to defend. (See also Drury against Cross, 7th Wallace, 299.)

Bronson against Lacrosse Railroad, 2nd Wallace, 283, where the court said:

"Undoubtedly, in the case supposed, it would be a reproach to the law, and especialty in a court of equity, if the stockholders were remediless. But in such a case the court in its discretion will permit a stockholder to become a party defendant for the purpose of protecting his own interests against unfounded and illegal claims against the company, and he will also be permitted to appear on behalf of other stockholders who may desire to join him in the defense."

The right of a stockholder to maintain an action for the purpose of remedying some wrong to the corporation, or to their rights as stockholders, by independent action or suit, has been acknowledged in a great many cases. The only requirement is, that the member shall first request the corporation, or its proper officers, to maintain or bring such a suit, and aver their failure to do so. This right has been recognized by the federal courts especially, until it is now acknowledged and established by Rule 94, as follows:

"Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may be properly asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transactions of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on the court of the United States jurisdiction of a case of which it would not otherwise have cognizance."

In a note to section 691, "Cook on the Law of Stock and Stockholders," there is a collection of cases on this subject, and no further reference need be made to the cases themselves than to refer to that note. Indeed, so well has the right been recognized that it is said that even this requirement of notice to the company to bring the action has so many exceptions to it that the rule is now the exception.

In Wood's Railway Law, section 63, page 152, it thus stated:

"But to this rule there are so many exceptions that it may be said that the exception, rather than the rule, prevails. And it is now generally held to be sufficient if the bill of complaint shows the reasonable excuse for not making such a demand, as that such a demand would have been fruitless, because the suit is brought to obtain redress against the acts of the directors themselves, which are *ultra vires*, or a fraud upon the stockholders."

See cases cited in note to section 63, Wood on Railway Law, on pages 151, 152 and 153.

Section 64 of the same work, page 159, also gives instances in which a stockholder may intervene and institute a defence in an action against a corporation.

See also the cases cited in the note to that section.

And see *Tazewell County against Farmers' Loan and Trust Company*, 12 Federal Reporter, page 752, where it was held that even a ruling in a foreclosure suit, denying the petition of the stockholders to be made parties to the suit brought against their corporation, is not a bar to an independant suit by the stockholders to set aside the decree for fraud.

It may be said in passing, that the stockholders were not proper parties to the foreclosure suit, except for the purpose of defending under the rule stated, and of course such a defense could not be made in the absence of knowledge on the part of the stockholders of the facts whieh constituted a defense.

In Wood's Railway Law, page 1634, it is said:

"But except where the officers and managers of the company are fraudulently colluding with the stockholders, or are acting adversely with the interests of the corporation, or where the officers of the company fraudulently refuse to attend to the interests of the corporation, a mere stockholder cannot intervene, either by cross-bill or otherwise. But in the latter case a court of equity will permit a stockholder to become a party defendant for the protection of his own interests against improper claims."

See *Hawes vs. Oakland, 104 U. S. 450.*

Bronson vs. Lacrosse Railroad, 2nd Wallace, page 283.

Perdicarus vs. Charleston Gas Light Co., Chase's Dec., page 435.

Dodge vs. Woolsey, 18 Howard, 340, (the leading case on the subject in this country.)

It appears, therefore, that this complainant, acting for himself and all others who wished to unite with him, has a right, first, to maintain a suit to set aside the decree for fraud, and secondly, when the decree is set aside, to intervene under the allegations of this bill for the purpose of defending against the trustees' suit for foreclosure. It is alleged sufficiently in the bill that the stockholders were not possessed of the information, and had no means of obtaining it, and were excusable in their ignorance of it, to make the defense which is now sought to be made at an earlier date than the action now taken by them.

This proposition is earnestly insisted upon, and finds approval in the decision of the Circuit Court on the demurrer:

"Complainant's ignorance of its (the fraud) existence, however superinduced, whether by fraudulent concealment or by negligence, in no way changes or affects the the material fact that the corporation, in whose behalf he now interposes, labored under no such want of knowledge or information."

By corporation of course is meant the board of directors, in whom is vested the corporate power, business,

and property of the company. These directors may enter into a conspiracy with a third party to defraud the stockholders out of their property, and effectually carry it out, and then when knowledge comes to the stockholder of the fraud and wrong of the directors, and he institutes a suit to undo the fraud, he is chargeable with the knowledge of the company possessed by the directors who committed the fraud.

It is claimed that this court has given authority to so infamous a proposition as that in two cases: Davenport vs. Dows, 18 Wallace, 620, and Hawes vs. Oakland, 104 U. S. 450-460.

I challenge an examination of those cases to find a hint of approval of any such doctrine.

In Davenport vs. Dows, this court held that a stockholder may bring a suit when the corporation refuses, and cites Dodge vs. Wolsey, 18 Howard 340, already cited here, but such a suit can only be maintained on the ground that the rights of the corporation are involved, and the corporation must be a party so as to be bound by the judgment.

In Hawes vs. Coutra Costa Water Co. and the city of Oakland, the court examined the right of the shareholder to sustain such a suit, and approving Dodge vs. Woolsey, 18 Howard 331, enumerates the circumstances under which such suit may be sustained. (1.) Any act

done or threatened by the directors beyond their authority. (2.) Any fraudulent transaction completed or threatened by the acting managers in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders. (3.) Where the board of directors, or a majority of them, are acting for their own interests in a manner destructive of the corporation itself, or of the rights of the other shareholders, &c., &c., with the statement by Mr. Justice Miller that other cases, where the injury was irremediable, would arise where the suit could be maintainable.

To the able opinion in that case we refer for absolute refutation of the doctrine sought to be supported by it, and which shocks the mind whenever it is approached.

We shall see that this court has expressly repudiated that doctrine in cases to which attention will be called later in this brief.

CONSTRUCTION OF CONTRACT OF MAY 4TH, 1872.

In construing this paper, it is first necessary to understand the relation of the parties before it was made.

The 4,460 bonds were all the bonds that were authorized to be issued for the completed line. It was the

entire intended or contemplated issue, in the event of the completion of the entire road. Only such part of them were to be issued as would represent blocks of $200,000 for each ten miles of road completed and operated—under the contract of July 20, 1871. The Pennsylvania Company was bound to construct the road. It was to be paid the $20,000 per mile in ten mile sections, or rather, as each ten miles were completed, the bonds for that were to be issued.

The Mansfield Company, therefore, was bound only to provide interest on the bonds after they were actually earned and issued to pay for earnings. It was not bound to provide anything for the bonds not earned, and holders of the bonds were entitled to interest only on the bonds issued in payment of completed road under the July contract.

Let it be remembered, also, that on May 4, 1872, no part of the bonds had been earned; that is shown by the paper itself. The contract was not, therefore, in relation to earned bonds, but the parties were each doing, or agreeing to do, that which they were not bound or had not agreed to by the contract of July, 1871.

After reciting the contract of July, the May contract says:

"Now, in consenting by the M. C. & L. M. R. R. Company, to deliver *all* of said bonds now, *before the iron is laid*, and in consideration thereof, the Pennsylvania Company obligates itself to take care of and *pay*

all interest which may mature prior to said M. C. & L. M. R. R. Company being in condition for traffic; and for all interest so paid by the Pennsylvania Company and not *justly and equitably chargeable thereto*, under said contract of July 20, 1871, said Pennsylvania Company shall be *reimbursed out of the earnings* of the said M. C. & L. M. R. R., after the same shall be completed in sections, under said contract, and begin to make earnings on the respective sections as required by the terms of said agreement."

The Pennsylvania Company was to pay all the interest on all the bonds which might accrue prior to said railroad being in condition for trafic, and any interest which it paid, which the M. C. & L. M. R. R. Company ought to have paid under the contract of July, 1871, was to be repaid out of the earnings after the completion in sections under the July contract. The only interest which the Pennsylvania Company could pay and which *was not justly and equitably chargeable to it*, was interest on bonds which it might at any time have earned under the July contract, and hence it was the interest which was to be repaid out of the earning of the completed sections for which the Pennsylvania Company was under the July contract to receive bonds.

Besides, it was clearly the intention of this contract that the Pennsylvania Company was to, and did receive the entire issue of bonds then and there, May 4, 1872. The interest it was agreeing to pay was *all* the interest on the bonds thus received; namely, *all* the bonds. It had then earned none and was entitled to none. It never would become entitled to *all* the bonds until *all*

the railroad was completed and ready for traffic. It agreed to pay *all* the interest on *all* the bonds until *all* the railroad was in condition for traffic, and was to be reimbursed for the interest which it paid on each $200,000 after each ten miles was completed, out of the earnings of the completed road.

If this is correct, it follows, of course, that in no event was the Pennsylvania Company, or its trustees, entitled to any relief at the time of the decree, or any one else who had taken the bonds from the Pennsylvania Company with notice of this agreement.

It is admitted, in this argument, that the allegations of our bill are true; that the Pennsylvania Company, the Pennsylvania Railroad Company, and the trustees, were all in the same interest, all having knowledge, the two corporations the same, with the same officers, and the trustee and solicitor being officers of both, and the persons who transacted the entire business.

We are utterly at a loss to understand the conclusion of the learned Circuit Judge that this contract only provided for the payment of interest on the bonds to which the Pennsylvania Company was not entitled under the contract of July 20, 1871; (page 126, printed record), or how the learned judge reconciles the importance he gives to that construction with the other fact which he lays great stress on, that the Pennsylvania Railroad Co. was the owner of the bonds upon which the decree was rendered, or with the allegations

of the bill that none of these bonds were earned, although the whole issue was delivered under the very terms of the contract of May 4th, 1872.

WAS THE ACTION OF THE DIRECTORS OF THE MANSFIELD COMPANY, THE COMPLAINANT TRUSTEES, THE PENNSYLVANIA COMPANY, FRAUDULENT IN OBTAINING A DECREE AND SALE UNDER THE CIRCUMSTANCES ALLEGED IN THE BILL?

The consideration of the attitude and relation of the parties to the property will answer this question without any discussion. If there was no fraud in obtaining the stock of the Mansfield Company, the case would be one which would shock the conscience of the chancellor, but it becomes aggravated under the allegations of the bill that the control of the defendant company was itself a fraud, as obtained by the agents of the Pennsylvania Company. It need not be more than stated at this day that the directors of a corporation are, at least, *quasi* trustees for the creditors and stockholders. They are practically trustees for the whole body of stockholders, *cestuis que trust*. It is this principal, now so well recognized, that has been the protection to the stockholders in the courts of equity. That the ordinary and stringent rules requiring the utmost good faith, and absolute freedom from personal interest, in the trans-

actions of trustees and in the administrations of trusts, are applicable to the transactions of directors of a corporation, and that tested thereby all such acts are fraudulent or otherwise. But in the desire to furnish additional safeguards and to provide additional remedies, courts of equity have gone farther than these rules relating to trusts, because as has been said by the courts, it is doubtful whether the laws covering trusts are broad enough to circumvent the ingenious plans and schemes of corporate directors to defraud the corporation and stockholders, and the courts of equity have said that a safer reliance can be placed in the principal of law and equity—that "for every wrong there is a remedy,"—that in the freedom and fearlessness which are allowed to courts of equity in searching and circumventing frauds of all character, is found the greater safety of the stockholders of a corporation against the fraudulent acts of its agents.

MORAWETZ ON CORPORATIONS. SECTION 237.—THE COLLECTIVE RIGHTS OF SHAREHOLDERS.—"In determining whether individual shareholders can sue for the protection of their collective interests in the company, it is necessary to consider, firstly, the exact nature of the rights of the shareholders, and secondly, the rules of procedure which have been established by law for reasons of convenience or necessity.

"The relation between a corporation and its several members may, for practical purposes be treated as that of trustee and *cestui que trust*. In contemplation of law, the property and rights of an incorporated association belong to the corporation as an entity, and not to the shareholders. The latter, however, are the real

parties in interest, each shareholder having an interest which may be defined, in general terms, as a right to have the corporate property and affairs managed in accordance with the charter and articles of agreement; and this right will be protected and enforced by the Courts of Equity, by treating the corporate entity as their trustee. The nature of the trust is declared in the charter, to which the stockholders have unanimously agreed: 'As the shareholders are in substance partners in a trading corporation, the management of which is intrusted to the body corporate, a trust is by implication created in favor of the shareholders, and the corporation will manage the corporate affairs and apply the corporate funds for the purpose of carrying out the original speculation.'"

The directors of the Mansfield Company were, therefore, the trustees of the complainant and his co-stockholders. They were absolutely bound to the highest obligation of protecting the interests of the corporation and its stockholders against all attacks from whatsoever source. They were bound to the single disinterestedness of the watchful trustee, whose sole interest and duty was to protect the *cestui que* trust. The stockholders had the right to rest in the security and confidence of the performance of this duty. The trustees of the mortgage, while their duties were passive, until default occured in the terms of the mortgage, that default which would make their position one of activity must have been, to justify activity, the default of the defendant company. It would be a violation of their duty and of the trust reposed in them to interfere with the corporate property until the interference was justified by the act or default of the mortgagor; and the law presupposes that the

trustee under the mortgage, while his first duty is to the bondholder after default, will act justly and disinterestedly between the parties. To enter into a collusion with the directors for the purpose of creating a default in favor of the bondholders would be the grossest kind of fraud. To enter into a conspiracy with the directors of the defendant company to induce the latter to withhold a valid defense to their action to foreclose the mortgage, as, to-wit, to waive the question of defense on the ground that no default had occurred, or that the default had been waived by the bondholders, or that a contract had been made by which no default should be declared until after a certain period, or that the bonds were not lawfully issued and no consideration had been paid for them by the bondholders, or that they were paid, or any other defense of like nature, would need no characterization, because the very suggestion of it shocks the ordinary mind. Now, when you add to that that the alleged bondholder has obtained the bonds without consideration, and unlawfully, or that having obtained them with the assistance of the defendant company, they agree that into whosesoever hands they pass, they, the recipient of them, will pay the interest and prevent a default, and the bonds remain in their hands as the sole holders; and a default alleged by the trustees is the default of the sole holders of the bonds, and in addition to that the complainants, the mortgage trustees, are the managing officers and agents of the bondholders, not by virtue of their trusteeship under the mortgage, but by virtue of their individual and private relations with the

holders of the bonds, and that through their machinations they have wrongfully obtained control of the board of directors of the defendant company by putting therein their creatures and employes for the very purpose of concealing from the stockholders the true situation, and for the very purpose of obtaining the consent of the directors to the fraudulent decree proposed; and that all this is done by the pretended bondholders, trustees under the mortgage, and their solicitors, so that for all purposes the trustees, the bondholders, and the directors of the railroad company, are the same, controlled by the same men, governed by the same mind, then you have practically the case which we present in our bill. All this is now sanctioned, it is said, by decree of this court, but as was said by Thompson in a paragraph already quoted, "The chancellor not only has not circumvented the rogue, but the rogue has made the chancellor his tool in the accomplishment of its nefarious purpose."

It was the duty of the directors of the Mansfield Company not only to strenuously insist upon the defense made in the case by the answer which was filed and wrongfully withdrawn, but to make a defense based upon the contract of May, 1872. The fact of the existence of that contract was known to these directors, who were the agents and tools of the Pennsylvania Company. Now, that they did not do it is not the result of mere neglect, which waives the right to defend, but it was the result of a direct fraud and conspiracy in the interest of the alleged bondholders. It was the duty of the trustees under the mortgage to refuse to prosecute an action

or a suit in favor of the bondholders, who had themselves become bound to prevent the default which gave the cause of action. That they did not do so was not the result of mistaken judgment or ignorance, but was the result of a direct fraudulent purpose to obtain for the company, in whose interest they were acting solely, the title and possession of this property, without any consideration.

It was the duty of the Pennsylvania Company, the sole holder of these bonds, to pay the interest on the bonds after they had passed out of their hands; or, if they remained in their hands, to deliver the coupons cancelled to the company. That they did not do so was not the result of oversight, or mistaken judgment, but the result of a deliberate and fraudulent purpose on its part, through the instrumentality of its officers and agents, who had been injected into the position of trustees under the mortgage, and the trustees of the defendant company, namely, its directors, to obtain the property without consideration.

Who was there to convey to the chancellor the intelligence that the decree, which was being entered by him, was a fraud?

The Pennsylvania Company had control of the mortgage trustees, of the directors of the defendant company, of the solicitors, who were subject to the orders of the directors. It was plaintiff and defendant, trustee, seller, and purchaser. It held both ends of the string, and had

all of its length wound around its palm. And all of this, remember, when the stockholders were resting in security that their directors were acting in good faith in the protection of their interests, and without knowledge of the facts, now within their cognizance.

That a decree was entered under such circumstances only makes the fraud more flagrant. It has ceased to be a novelty that such a decree will be treated by courts of equity only as a consummation of the projected fraud, the more readily to be set aside because of its instrumentality in making the fraud successful.

A very interesting chapter on the frauds of directors and trustees, is chapter 39, commencing with section 640, Cook's Law of Stock and Stockholders, with the accompanying citations of numerous authorities in support of the text; and without spending much time in the way of quotation, we ask the careful consideration of the discussion there had.

Ever since the case of *Michaud vs. Girod*, 4 Howard, 503, followed by the numerous cases in this country and England, it may be said to be the law that a trusteee cannot be interested in the purchase of the property which it is his duty to sell; or in the sale of property which it is his duty to buy. And this principle has been so extended that where the principals of purchaser and seller have common agents in the purchase and sale, the transactions are alike repugnant to the conscience, and will be set aside in equity.

Now, we need not argue that any direct transaction between the Pennsylvania Company and the Mansfield Company, after it had, by the wrongful procurement of the stock of the latter company, placed in a board of directors its own servants and agents, as the instrumentality through which such transactions were to be made, whereby the property of the latter company was transferred to the former, even for a valid consideration, would be set aside in equity at the suit of the latter, or either company. How much more so is that proposition true when the transfer is made absolutely without consideration, depriving the stockholders of the latter company of its valuable property and franchises, wholly without any recompense or equivalent.

Now, that this result was accomplished through the instrumentalities of a decree of the court, where the decree was necessarily but a pure matter of form, the allegations being made, and a failure to answer or controvert them being permitted, by the same parties, for the purpose of accomplishing that which directly done would be void, and brought about by active fraud of the parties standing in the relation that they did in this case, adds, in our judgment, only this addition to the *status* first presupposed, namely, that the courts have been made instrumental in accomplishing a great fraud, not through the intelligent acting of the court, but because the deceit was practiced as well upon the court as upon the party whose interests were affected.

But in the case at bar it was not common directors,

but actually paid employes of the Pennsylvania Company who controlled the defendant; who had not the independence of stockholders and directors, but were the servants, under the control of the Pennsylvania Company, and entirely subject to its will, so that their acts were the acts of the Pennsylvania Company; and the mortgage trustees were controlled in the same interest.

To show the extent to which courts have gone in setting aside transactions between corporations having their agents or directors in the boards of each, we cite the cases following. It is not of course material to the case under consideration. No court would uphold a transfer of the property of the Coldwater Company to the Pennsylvania Company, brought about by the action of the latter's employes or agents, who had control of the directors of the former, even in the absence of actual fraud. The courts would not inquire into the *bona fides*. They would not permit such a temptation to personal interest, if not bad faith, to be tolerated. But in the face of the allegations of actual fraud and bad faith, it requires no authority to show that such a transaction would be set aside. The form the transfer takes in such case makes no difference, whether by deed direct, or decree and sale by a court. The fraud taints and annuls each alike.

COOK ON STOCK AND STOCKHOLDERS. SECTION 658.—CONTRACTS BETWEEN CORPORATIONS HAVING ONE OR MORE DIRECTORS IN COMMON.—"It has been difficult to determine whether a stockholder in one cor-

poration could cause to be set aside a contract or agreement between two corporations having one or more directors in common. The late and important case of the Metropolitan Railway Company against the Manhattan Railway Company clearly establishes the rule that where two corporations enter into a contract such contract may be set aside as fraudulent if, at the time of contracting, the two corporations had one or more directors in common."

"*15 Am. and Eng. R. R. Cases 1 (1884.)*—The history of this well known litigation is as follows: The New York Elevated Railroad Co. and the Metropolitan Elevated Railroad Company leased all their property to the Manhattan Railroad Co. under a lease whereby the latter was to pay to all the stockholders of the former two companies ten per cent. per annum on their stock. It amounted to a guaranteed dividend. Subsequently a minority of the directors of the Metropolitan Co. were also directors in the Manhattan Co. These two corporations then contracted, through their respective boards of directors, to reduce the guaranteed dividend from ten to six per cent. The Metropolitan Co. then brought suit to set aside this reduction, and succeeded. Under the same state of facts the federal court, in Flagg v. Manhattan Ry. Co., 20 Blatchf. 142 (1881,) had decided that the stockholder could not have the transaction set aside. But Mr. Justice Van Brunt refused to follow the federal decision, and in a masterly and exhaustive opinion clearly established the rule given in the text. The court said:

"I can see no difference in principle between the case of a director contracting with his corporation and that of directors of one corporation contracting with themselves as directors of another corporation. The evils to be avoided are the same, the temptations to a breach of trust are the same, the want of independent action exists, and the divided allegiance is just as apparent. * * * * It may be urged that the position

of a director in a corporation does not give him the same degree of personal interest in its success as would be the fact were he simply entering into the contract to be personally benefited thereby; that he is one of many, his interests are divided with that of the stockholders, and his influence may be counteracted by his co-directors. But the fact that he has an adverse interest to the one or the other of the corporations is apparent, and that he is attempting to *serve two masters* is also equally plain. It must necessarily happen, according to the rules which have been laid down by the courts of equity in reference to the action of agents, that he will, in nine cases out of ten, serve the interest of the one principal and betray those of the other; and, in order to remove persons so situated from all temptation, in order that there may be no uncertainty in the law in reference to such contracts, courts of equity have held that where there is such a conflict of interests between an individual and a corporation, or between corporations having common directors, that the contract shall be voidable as matter of equity, without any evidence whatever of misconduct upon the part of the agent or director. If the rule is to be so far relaxed that common directors may participate in the contracts between corporations, or if common directors may allow contracts to be made between the two corporations that they represent, it would present the same field of speculation and the same uncertainty of result for courts to attempt to investigate the motives of the common directors to determine the influence which they had upon their associates, to determine the fairness and reasonableness of the contract, to investigate all the influences which were at work which led to the entering into the contract, which has been so severely condemned by the cases passing upon the rights of *cestui que trust* in reference to contracts made by common trustees. Contracts of this kind would be left involved in a sea of doubt, and a prediction as to the result of an investigation as to their fairness and honesty would be the merest speculation. It was to relieve the courts from such investigations, and to let parties understand precisely the ground upon which they

stood, that the stringent rules in regard to agents and principals were adopted, and the same reasons require that, in order that there may be reasonable certainty in reference to the results to be arrived at in investigating the contracts between two corporations who have common directors, and therefore conflicting interests and conflicting duties, the same rule must be necessarily adopted, namely, that at the option of the *cestui que trust*, or of the corporation, such contract may be voided."

"For other cases connected with this litigation, see N. Y. El. R. R. Co. v. Manhattan Ry. Co., 14 Abb. N. C. 152, note; Manhattan Ry. Co. v. N. Y. El. Co., 29 Hun. 309, rev'g N. Y. Daily Reg. Dec. 2, 1882; People ex rel. Content v. Metropolitan Ry. Co., 26 Hun. 82; Harkness v. Manhattan Ry. Co., N. Y. Daily Reg. Oct. 8, 1886. A strong case in support of the same principle is Bearson v. Concord R. R. Co., 13 Am. & Eng. R. R. Cas. 102 (N. H. 1883,) where the court, in setting aside a contract made by corporations having common directors said:

"Stockholders and creditors are entitled not only to the vote of a director in the board, but to his influence and argument in discussion."

"Distinguishing Rolling Stock Co. v. R. R. Co., 34 O. St. 465; Ashurst's Appeal, 61 Penn. St. 291; Watt's Appeal, 78 Penn. St. 370. See also Wardens, etc., v. Rector, etc., 45 Barb. 356 (1865,) where the court said:

"When the same person acts in a double capacity as agent or trustee, he must see to it that the transaction is fair and unexceptionable as regards the rights of either of the parties which he so represents. If any motive of personal convenience or interest has been subserved, it will constitute a badge of fraud."

"In Bill v. Boston Union Telegraph Co., 16 Fed. Rep.

14 (1883,) where, however, the fraud was more clear, since the directors common to both corporations constituted a majority of the directors of one of them, the court said:

"Undoubtedly the same person may be the agent of two distinct principals, and bind them both by his acts for each; but this is where he is expressly or impliedly authorized to act for each in the transaction with the other."

"See also San Diego v. San Diego etc. R. R. Co., 44 Cal. 106 (1872); Wallace v. Long Island R. R. Co., 12 Hun. 460 (1877); C. F. Booth v. Robinson, 55 Md. 419 (1880), distinguished in Manhattan etc. Co. v. Metropolitan etc. Co., supra. Also Mayer etc. v. Inman, 57 Ga. 370 (1876), where the town officers merely executed bonds to a railroad company of which they were directors. The bonds were held to be valid.

"In Godin v. Cincinnati & W. Canal Co., 18 O. St. 150 (1868), the court well said:

"A director whose personal interests are adverse to those of the corporation has no right to be or act as a director. As soon as he finds that he has personal interests which are in conflict with those of the company, he ought to resign. No matter if a majority of the stockholders, as well as himself, have personal interests in conflict with those of the company. * * * He is trustee for the *company*, and whenever he acts against *its* interests, no matter how much he thereby benefits *foreign* interests of the individual stockholders, or how many of the individual stockholders act with him, he is guilty of a breach of trust, and a court of equity will set his acts aside at the instance of stockholders or creditors who are damnified thereby."

See also as to fiduciary relation of directors:

Redfield on Railways, Vol. 1, page 226.

New York Midland Ry. Co. vs. Hudson, 19 Eng-Law and Equity, R. page 365.

Great L. Ry. Co. vs. Mageny, 25 Bearan 586.

Cumberland Coal Co. vs. Sherman, 30 Barbour 553.

Ogden vs. Murray, 39 N. Y. 202.

Hoyle vs. Plattsburg etc. R. R. Co., 54 N. Y. 314.

Wardeli vs. U. P. R. R. Co.

Duncomb vs. N. Y. H. T. & N. R. R., 84 N. Y. 190.

That such action by the directors, acting in the interest of an adverse party, will be conclusively presumed to be fraudulent, is established by the overwhelming weight of authority:

Wood, Railway Law, page 372.

Pierce on Railroads, page 36.

European & N. Am. R. R. vs. Poors, 59 Maine 279-281.

Luxunberg R. R. vs. Mageny, 25 Bearan 586.

Michaud vs. Girod, 4 Howard 586.

Cumberland Coal Co. vs. Sherman, 30 Barbour 553.

Ogden vs. Murray, 39 N. Y. 202-207.

Bank vs. Gifford, 47 Iowa 575.

People vs. Tp. Board, 11 Michigan 223-225.

Metropolitan Ry. Co. vs. Manhattan Ry. Co., 15 American and English Ry. Cases, page 61-74.

Twinlick Oil Co. vs. Maxbury, 91 U. S. 587.

Wardell vs. Union Pacific Ry. Co., 103 U. S. 651.

Aberdeen Ry. Co. vs. Blaikie Bros., 1 McQueen 461, quoted 15 Am. and Eng. Ry. Cases 69.

Goodin vs. Cin. & Whitewater Canal Co., 18 O. S. 182.

Rolling Stock Co. vs. Railroad, 34 O. S. 460.

Wade vs. Pettibone, 11 Ohio 57-60.

Duncomb vs. N. Y. Central R. R. Co., 13 Am. and Eng. R. R. Cases 93; note, with a collection of cases.

Gardner vs. Butler, 30 N. J. Eq. 702-724.

Pain vs. Irwin, 16 Hun. 390.

Flint & P. M. R. R. vs. Dewey, 14 Mich. 447-487.

Devon vs. Fanning, Johnson's Chy. 260.

Ramelsberg vs. Mitchell, 29 O. S. 46.

STOCKHOLDERS NOT CHARGEABLE WITH NOTICE; NOT BOUND TO EXAMINE RECORDS; NOT BOUND TO SUSPECT OR PRESUME FRAUD BY THEIR DIRECTORS.

It is alleged in our bill, that the records of the company were kept out of the reach of the stockholders; that they did not have access to them; that no annual or other meetings of the stockholders were called; that no reports to the stockholders were made; and the necessary information, which they might have obtained from such meetings or reports, was purposely withheld from them.

Under our statute, section 3248, R. S.:

"The corporate powers, business and property of corporations formed under this title, must be exercised, conducted and controlled by the board of directors," etc.

The stockholders, as such, had no power except the power to vote, unless some *ultra vires* or fraudulent act was brought to their notice. They were not bound to assume that their directors would act fraudulently. They had the right to rely upon their acting in perfect good faith. That any matter which was important or proper for them to know would be communicated to them by their agents, the directors.

We assume this to be true: (1.) That the stockholders had no power to interfere with the directors' control of the company; no power to determine, apart from the directors, whether there was a defense to any action; no power to employ counsel for the company. (2.) That they were not bound to suspect or presume that their directors or agents were acting fraudulently in concealing any facts from them, or in withholding any defense which ought to be made. (3.) That as they had no power or control of the corporate affairs, they were not bound to intrude themselves into those affairs as detectives or spies on the acts of the corporate officers, and hence, were not chargeable with any neglect in not doing so, especially as no new rights accrued which in any sense may be said to be based on any acquiescence of the stockholders which can be presumed from delay.

If these stockholders had gone personally to the records in this court at Cleveland, and learned all that was there contained, they would still have the right to presume that their agents acted in good faith in withdrawing the defense; that it was withdrawn because the honest judgment of the directors was that the defense was not true or good; that the proof would not establish the defense, and that the directors were actuated solely by their duty to the company and its stockholders. And until some fact came to their knowledge which charged them with notice to the contrary, they had the right to rely thereon. That fact coming to their knowledge, the equitable rule which requires promptness was invoked, and, tested by that rule, our bill is perfect.

But what duty, let us ask, required such an examination by the individual stockholders?

Their directors had the complete control and management of the corporate affairs and property. By law those directors were bound to the strictest honesty, good faith and vigilance in the defense of the corporate rights and the interests of the stockholders. To say that they must personally examine the acts of the directors is to say that they must suspect those acts. The law, which withholds from them all exercise of corporate power and places it wholly in the hands of the directors, exempts them from any charge of acquiescence in fraudulent acts until apprised of them. *The duty to apprise them is on the directors, and neither they nor any one*

participating wtth them in the unlawful act can be heard to claim acquiescence or laches during any period of suppression of the knowledge of such acts.

Hence stockholders are not chargeable with notice of such acts until actual notice is brought home to them. They are not bound to examine the records or books. Not, as between them and the directors, bound by notice of any kind except actual notice. This is supported by this court.

Pacific R. R., Mo., vs. Mo. Pacific R. R. Co., 111 U. S. 505.

Kilbourn vs. Sunderland, 134 U. S. 505.

COOK ON STOCK AND STOCKHOLDERS. SEC. 685. "STOCKHOLDER CHARGEABLE WITH LACHES ONLY AFTER HE HAS FULL KNOWLEDGE OF THE FACTS.—Laches is a defense only when the stockholder with a full knowledge of the facts has delayed an unreasonable length of time in bringing his action. These two elements, knowledge and delay, are the essential elements of the defense. Until the stockholder has full and complete knowledge of all the essential facts which would be likely to induce him to institute the action, the beginning of the time from which laches will run can not be said to commence. Where, however, the facts are well known to all intelligent men, and the means of knowledge are open to the stockholder, he is chargeable with knowledge from the date when he should have ascertained the facts.

"But it is not incumbent on the stockholder to keep himself informed as to the various acts of the corporation. He is not chargeable with knowledge merely because he might have ascertained the facts by an examination of the corporate books. Moreover, it is the well

established rule that lapse of time alone can not support the defense of laches. There must be both knowledge and delay."

Thus in the leading case of *Cumberland Coal Co. v. Sherman*, 30 Barb. 533 (1859), the following from Lewin on Trusts is stated to be the law in relation to stockholders:

"1. The confirming party must be *sui juris*, not laboring under any disability, as infancy or coverture. 2. The confirmation must be a solemn and deliberate act—not, for instance, fished out from some expressions in a letter; and particularly when the original transaction was infected with fraud, the confirmation of it is so inconsistent with justice and so likely to be accompanied with imposition, that the court will watch it with the utmost strictness, and not allow it to stand but on the very clearest evidence. 3. There must be no *suppressio veri* or *suggestio falsi*, but the *cestui que trust* must be honestly made acquainted with all the material circumstances of the case. 4. The confirming party must not be ignorant of the law; that is, he must be aware that the transaction is of such a character that he could impeach it in a court of equity. 5. The confirmation must be wholly distinct from and independent of the original contract—not a conveyance of the estate, executed in pursuance of a covenant in the original deed for further assurance.. 6. The confirmation must not be wrung from the *cestui que trust* by distress or terror. 7. When the *cestui que trust* are a class of persons, as creditors, the sanction of the major part will not be obligatory on the rest; but the confirmation, to be complete, must be the joint act of the whole body."

And in the equally important case, *Hoffman, etc. Co. v. Cumberland, etc. Co.*, 16 Md. 456 (1860), the court said:

"To render the act of ratification effective and conclusive, certain considerations are necessary. At the time of the supposed ratification the principal must have been fully aware of every material circumstance of the transaction, the real value of the subject of the contract, and his act of ratification must have been an independent and substantive act, founded on complete information and on perfect freedom of volition, and, in addition to all this, the *cestui que trust* must not only have been acquainted with the facts, but apprised of the law how these facts would be dealt with if brought before a court of equity."

In *Gilman, etc., R. R. Co. v. Kelly*, 77 Ill., 426 (1875), the court said:

"No ratification will estop the principal unless he has been made aware of all the material facts and circumstances of the transaction that would in any way influence his mind or affect the value of the contract."

Stewart's case, L. R. I. Ch. 511 (1866); *Stanhope's case*, Id. 161, where the court said:

"It is no part of the duty of a shareholder to look into the management of the business. * * * * It is not enough to show that they might have become acquainted with the mismanagement of their affairs. It must be shown that they did so. See Ryan v. Leavenworth, etc., Ry. Co., 21 Kan. 365 (1879). Also Holmes v. Newcastle, etc., Co., 44 L. J. (Ch.) 383 (1876), holding that knowledge of a sale of property is not knowledge of an illegal dividend from the proceeds. See also Spackman v. Evans, L. R. 3 H. of L., 171 (1868). See also Houldsworth v. Id., Id. 263."

Evans v. Smallcombe, L. R. 3 H. of L., 249 (1868); affirming L. R. 3 Eq. 769, the court saying:

"*Lapse of time alone, certainly, would not make valid that which, at the beginning, was invalid.* * * Length of time may, in many cases, materially assist in establishing the presumption of acquiescence in an act which requires a confirmation to give it validity. But then it is not time, but the acquiescence, which changes what would otherwise be a void act into a valid one." Ashurst's Appeal, 60 Penn. St. 290 (1869), where, however, the court says that "Acquiescence is presumed from delay."

The question of lapse of time is considered only as it raises a presumption of acquiescence, or calls into activity questions of public convenience, and is not at all used as a protection to the perpetrator of a fraud, where the other considerations do not exist.

LEWIN ON TRUSTS, TEXT-BOOK SERIES, PAGE 1065. —"11. The court, after great length of time, will *presume* some act to have been done, which, if done, is a bar to the demand.

(1.) "The period at which the court raises the *presumption*, depends upon the circumstances of the case. As a general rule, the court presumes after a lapse of twenty years; but where there is a statutable bar at *law*, and of a different period, the court will not entertain a *presumption* within a *less time* than the period fixed by the statute.

(2.) "Presumptions are made, not necessarily because the court really believes what is presumed, but in the absence of evidence, for the purpose of quieting the possession. Lord Erskine observed, 'It is said you cannot *presume* unless you *believe*. It is because there are no means of creating belief or disbelief, that such general presumptions are raised.' Where positive evidence can be presented to the court, the fact may be presumed after a period much shorter than the usual one. And

on the other hand, though the distance of time may be far greater than the ordinary limit of presumption, yet if there appear any positive evidence to negative the fact, the legal inference cannot be sustained, for the rule is STABIT PRÆSUMPTIO DONEC PROBETUR IN CONTRARIUM. But the court has judged it better for the ends of justice, that the presumptions should be favored in law, and should not be rebutted by slight evidence in contradiction.

(3.) "The court cannot *presume* a person to have abandoned his right so long as he remains in *ignorance* of it, or labors under a *mistake;* and the *distress* of a person, so far as it accounts for his *laches*, will *pro tanto* weaken the foundation of the presumption. So a release of right cannot with the same force be presumed against a *class of persons* as against an individual; *for it is not likely that a person having only an alliquot share in the property should pursue his remedy with the same spirit as if he were the exclusive proprietor.*

"III. Though the plaintiff's demand cannot be met by an absolute bar, and no release of right can be presumed; yet, thirdly, relief will be granted where, if administered, it would lead to great public or private inconvenience.

(1.) Thus, in an action for an account against an executor or administrator, who is in equity a trustee, and was formerly not protected by any statute of limitations, though the presumption of a final settlement may be rebutted by positive evidence, the court will not open the account at any distance of time, when it is probable that most of the parties are dead, and the vouchers and receipts are lost.

(2.) "Where a suit was prosecuted after a delay of three score and two years, Lord Keeper Wright said that 'the cause being now within one year of the grand climacteric, it was fit it should be at rest.' But bills have been dismissed at the end of twenty-seven years, and a much shorter period would be a sufficient bar

should the court see a difficulty in granting the relief. *Every case must be determined with reference to its own particular circumstances.*

(3.) In *Pickering v. Lord Stamford*, a testator gave the residue of his personal estate to a charity, and thirty-five years after his decease, the next of kin filed their bill for an account, and prayed that such part as consisted of money upon mortgage or other real securities, might be declared a void bequest, and distributable subject to debts, etc., among the testator's next of kin. Lord Alvanley said: '*I know no rule that has established that mere length of time will bar.* Therefore, that being the case, I am to say whether under the circumstances a bar can be presumed.' And for facilitating the question of presumption, his lordship directed certain previous enquiries by the master; and it appearing from the report, that no release or assignment of their interest by the next of kin for the purposes of the charity could, under the circumstances, be presumed; his lordship then had recourse to the ground of inconvenience. The question, he observed, in all these cases, is whether there are motives of public policy or private inconvenience to induce the court to say the suit ought not to be entertained. 'If,' said his lordship, 'from the plaintiff's lying by, it is impossible for the defendants to render the accounts he calls for, or it will subject them to great inconvenience, he must suffer; or the court will oppose, what I think the best ground, public convenience. The plaintiffs are so conscious of this, that they do not call on the trustees to account for what has been disbursed before any demand made. It appears that the trustees, who by their conduct have done themselves great credit, have kept such accounts that there is no difficulty in finding the personal estate at the death of the testator. Therefore, desiring to be understood by no means to give any countenance to these stale demands, but upon the circumstances that there is nothing inducing great public or private inconvenience, that the accounts are found, and that the trustees are not called on to account for what has been disbursed, I am bound to decide in favor of the plaintiffs.'"

In *Harmood v. Oglander*, 6 Ves. 199, 8 Ves. 106, the bill was filed after a lapse of thirty-two years, yet neither Lord Alvanley nor Lord Eldon considered the length of time to bar the plaintiff's demand; but in this case the parties were equitable tenants in common, and as between them the presumption of ouster did not arise.

THERE NEVER WAS A TRIAL OF THE CASE OR ANY JUDGMENT ON THE MERITS.

The case presents exactly the condition commented upon by the courts in the cases following, as a ground for equitable relief. The defense was not presented, it was circumvented by the fraud of the parties whose duty it was to make it, it was the unfaithfulness of the directors and trustees of the defendant that permitted, nay, procured the decree to be entered. There is practically no difference between such unfaithfulness and the unfaithfulness or treachery of a solicitor employed by the defendant. This unfaithfulness was in the interest of the complainants and the bondholders: procured and brought about by them. We present a much stronger case than any of the supposed cases in the opinions following.

In the case of *The Pacific Railroad of Missouri, against The Missouri Pacific Railway Company et al.*, 111, U. S., page 505, will be found a very instructive

and interesting discussion of many of the questions presented in the present case. In that case, a bill was filed, in many respects like the present one, for the purpose of setting aside a decree of foreclosure against a railroad company, and sale of the property, on the ground of fraud. It was held in that case that the charges of fraud in the bill were sufficient to warrant the discovery and relief based on those charges; that the case set forth in the bill, being one showing that no real defense was made in the K. suit, because of the unfaithful conduct of the solicitor and the directors of the defendant in that suit, was one of which a court of equity would take cognizance; that as the bill showed hostile control of the corporate affairs of the corporation by its directors during the period covered by the K. suit, mere knowledge by, or notice to the plaintiff, or its directors, or officers, or stockholders, of the facts alleged in the bill during that period was unimportant. The case of acquiescence, assent or ratification, or of the intervention of the rights of innocent purchasers, not being shown by the bill.

We do not care to quote the statement of facts in that case, but the questions raised by the demurrer cover practically all that can be raised by the demurrer in the present case. The statute of limitations, laches, the right to sue, and many other grounds, that are not presented under the present demurrer, as for instance, that the bill failed to show that the complainant was ignorant, or that its stockholders were ignorant of the

facts alleged in the bill at the time of the decree, but that the bill showed that they had such knowledge.

And we ask attention to the following paragraphs in the opinion, while urging the careful examination of the entire case:

"The demurrers in this case are to the whole bill. If any part of the bill is good the demurrers fail. The charges of fraud in the bill, which are admitted by the demurrers for present purposes, are sufficient to warrant the discovery and relief based on such charges, leaving for consideration only the question of laches and of jurisdiction."

"On the admitted allegations of the bill, there was no real defense made in the Ketchum suit, and the present plaintiff was prevented from making that defense, by the unfaithful conduct of its solicitors and directors, and the directors of the Atlantic Company. A case of that kind is one of which a court of equity will take cognizance. *U. S. v. Throckmorton*, 98 U. S., 61 (XXV., 93.)"

"As to the question of laches, the pendency of the appeal taken in the Ketchum suit suspended the control of the Circuit Court and of every other court, over that decree, in respect to the relief sought in this suit, of setting that decree aside and declaring it fraudulent and void, all the other relief asked being consequent on that. The appeal appearing to have been taken and prosecuted in good faith, in view of what appears in the bill herein and in the report of the case in this court, we cannot hold, on this demurrer, that the time during which that appeal was pending can be counted against the plaintiff on the question of laches. *Ensminger v. Powers*, 108 U. S. 292, (XXVII., 732)."

"As to the frauds alleged in the bill respecting the matters in the conduct of the suit, resulting in the decree, the right to relief is based on the view, that the

corporation itself, the present plaintiff, speaking and acting now for its stockholders as a body, was powerless then, because it was misrepresented by unfaithful directors, who did what was done and refused to do otherwise, and through whom alone it could then speak and act. The allegations in the bill, of facts showing the existence of hostile control of the corporate affairs of the plaintiff by its directors, from before the bringing of the Ketchum suit till after the foreclosure sale, are entirely adequate as against a demurrer. Under such circumstances, mere knowledge by or notice to the plaintiff or its directors or officers, or more or less of its stockholders, is unimportant; and the plaintiff cannot be concluded by the failure of any number of its stockholders to do what unfaithful directors ought to have done, unless a case is shown of such acquiescense, assent or ratification, as would make it inequitable to permit what has been done to be set aside, or unless the rights of innocent purchasers have subsequently intervened, to an extent creating an equitable bar to the granting of relief. The bill in this case does not show such a state of things. While stockholders, more or less in number, may be allowed to interpose, if they have the means or inclination to take upon themselves the burden of such gigantic controversies as are involved in the railroad transactions of the present day, it would go far to legalize condonation of such transactions as are set forth in this bill, if mere knowledge by helpless stockholders of the fraudulent acts of their directors were to prevent the corporation itself from seeking redress, if it acts promptly when freed from the control of such directors. Fruitlessly requesting unfaithful directors to resign and to employ other counsel, so far from throwing on the stockholders the peril of losing their rights, represented by the company, if they do not personally assert them in the place of the directors, operates of itself, without more, only to aggravate the wrong. At the same time, it by no means follows that parties who have become interested in the plaintiff corporation with knowledge of the matters set forth in the bill, are entitled to the same standing, as to relief, with those who were interested in

the corporation when the transactions complained of occurred."

"As to the matters alleged which are extrinsic or collateral to the issues in the Ketchum suit, to what extent, greater or less, there is jurisdiction to examine them under this bill, is a question not to be decided on these demurrers to the whole bill. The bill is sufficient in regard to the other frauds alleged. But in regard to one of those extrinsic matters, the bill states that specified property not covered by the mortgage was put into the decree without the knowledge of the plaintiff."

In the case of *United States against Throckmorton* 98 U. S., page 61, the question of opening a decree for fraud was discussed, and Justice Miller states the rules in this question :

" There is no question of the general doctrine that fraud vitiates the most solemn contracts, documents and even judgments. There is also no question that many rights originally founded in fraud become—by lapse of time, by the difficulty of proving the fraud, and by the protection which the law throws around such rights once established by former judicial proceedings in tribunals established by law, according to the methods of the law —no longer open to inquiry in the usual and ordinary methods. Of this class are judgments and decrees of a court deciding between parties before the court and subject to its jurisdiction, in a trial which has presented the claims of the parties, and where they have received the consideration of the court.

" There are no maxims of the law more firmly established or of more value in the administration of justice than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely : "*Interest reipublicae, ut sit finis litum*," *and* "*Nemo bis vexari pro una et eadem causa.*"

"If the court has been mistaken in the law, there is a remedy by writ of error. If the jury has been mistaken in the facts, there is the same remedy by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the same proceeding, relief is given in the same suit, and the party is not vexed by another suit for the same matter. So in a suit in chancery, on proper showing, a rehearing is granted. If the injury complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final, a bill of review on that ground may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the same suit, and the rule framed for the repose of society is not violated.

"*But there is an admitted exception to this general rule, in cases where, by reason of something done by the successful party to a suit, there was in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance of the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side.* These, and similar cases which show there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing.

"See, *Wells, Res Adjudicata*, Sec. 499; *Pearce vs. Olney*, 20 Conn., 544; *Wierich v. DeZoya*, 7 Ill., (2 Gilm.) 385; *Kent v. Ricards*, 3 Md, Ch., 396; *Smith v. Lowry*, 1 Johns, Ch., 320; *DeLouis v. Meek*, 2 Green (Iowa), 55."

We ask the court's attention to the following cases, where decrees obtained by fraud were set aside:

3 Howard, 333.
6 Wallace, 752.
7 Wallace, 299.
104 U. S., 93.
3 McLean, 336.
12 New York, 156.
19 John, 162.
4 Comst., 514.
4 Comst., 292.
1 Johnson's Chy., 402.
19 Ohio, 448.
2 Kernan, 165.

Innumerable decisions of the same class might be cited, but equitable actions of this nature have been so universally recognized both in our state and federal courts that we deem it unnecessary to take up the time of your honors with more extended citations.

Examples of the exercise of jurisdiction to set aside judgments at law are found in the following section and note thereto in Pomeroy's Eq. Jur.:

"Section 7364. In the two preceding classes of cases the ground for interference was some equitable element or feature involved in the very subject-matter of the controversy, or in the remedies appropriate thereto, which constituted an equitable defence in full or in part to the legal action, and over which the court of equity had neither a concurrent or an exclusive jurisdiction.

In the present class there is no such equitable element or feature of the controversy; there is no equitable defence embraced in any possible issues, no equitable right or interest of the defendant which defeats or modifies the legal cause of action; all the issues are wholly legal. The ground for the equitable jurisdiction to interfere is, therefore, something *dehors* the issues, something arising out of or connected with the *trial* itself of the legal action in the court of law. It was a settled doctrine of the equitable jurisdiction—and is still the subsisting doctrine except where it has been modified or abrogated by statute, or has become obsolete through the enlarged powers of the law courts to grant new trials—that where the legal judgment was obtained or entered through fraud, mistake, or accident, or where the defendant in the action, having a valid legal defence on the merits, was prevented in any manner from maintaining it by fraud, mistake, or accident, and there had been no negligence, laches, or other fault on his part or on the part of his agents, then a court of equity will interfere at his suit and restrain proceedings on the judgment, which can not be conscientiously enforced. From the very nature of the case, this interference takes place after the judgment, and not while the action at law is pending."

"Truly v. Wanzer, 5 How. (U. S.) 141 ; David v. Tileston, 6 Id. 114 ; Hendrickson v. Hinckley, 17 Id. 443 ; 5 McLean, 211 ; Marine Ins. Co. v. Hodgson, 7 Cranch, 332 ; Ocean Ins. Co. v. Fields, 2 Story, 59 ; Robinson v. Wheeler, 51 N. H. 384 ; Wingate v. Haywood, 40 Id. 437,441 ; Emerson v. Udall, 13 Vt. 477 ; Gainty v. Russi, 40 Conn. 450 ; Dobson v. Pearce, 12 N. Y. 156 ; Mann v. Worrall, 16 Barb. 221 ; Foster v. Wood, 5 Johhs Ch. 87 ; Tomkins v. Tomkins, 3 Stockt 512, 514 ; Gifford v. Thorn, 1 Id. 703 ; Moore v. Gamble, Id. 246 ; Glover v. Hedges, Saxton, 113, 119 ; Boulton v. Scott's Adm'rs, 2 Green Ch. 231, 236, 241 ; Wistar v. McManes, 54 Pa. St. 318 ; Webster v. Skipwith, 26 Miss. 341 ; Humphries v. Bartee, 10 Sm. & Mar. 282, 295 ; Pelham v. Moreland, 11 Ark. 442 ; Nelson v. Rockwell, 14 Ill. 375;

How. v. Mortell, 28 Id. 479 ; New Orleans v. Morris, 3 Woods, 103 ; Smith v. McLain, 11 W. Va. 554 ; Shields v. McClung, 6 Id. 79 ; Crim v. Handley, 4 Otto 652."

"Among the examples of the fraud, etc., which are a ground for this equitable jurisdiction, are the following : Where the defendant is prevented from defending by false and fraudulent promises or representations that the proceeding will not be carried on against him, and relying thereon he does not contest the case, as he might have done, and a judgment is thus obtained against him: Pearce v. Olney, 20 Conn. 544 ; Huggins v. King, 3 Barb. 616 ; Powers' Ex'rs v. Butler's Adm'r, 3 Green Ch. 465 ; Holland v. Trotter, 22 Gratt. 136 ; Booth v. Stamper, 6 Ga. 172 ; Brooks v. Whitson, 7 Sm. & Mar. 513 ; How. v. Mortell, 28 Ill. 479 ; Perry v. Siter, 37 Mo. 273 ; Jarboe v. Cepler, 4 Ind. 177 ; McLeran v. McNamara, 55 Cal. 508 ; Miller v. Harrison, 32 N. J. Eq. 76 ; Cregar v. Cramer, 31 Id. 375 ; Purviance v. Edwards, 17 Fla. 140 ; Hinckley v. Miles, 15 Hun. 170 ; Scriven v. Hursh, 39 Mich. 98 ; Harris v. Western & At. R. R., 59 Ga. 830 ; Baker v. Redd, 44 Iowa 179 ; Markham v. Angier, 57 Ga. 43 ; Ellis v. Kelly, 8 Bush, 621, 631. The same would be true of fraudulent practices by which the defendant's witnesses were tampered with or removed, or his evidence was destroyed, so that he was unable to substantiate his defenses."

"Accident, if without any negligence on the part of the one who asks relief, as, for example, sickness preventing a defendant from making his legal defense : Bell v. Cunningham, 1 Sumner, 89 ; Devol v. Scales, 49 Me. 320 ; Carrington v. Holabird, 17 Conn. 530 ; 19 Id. 87; Forrester v. Wilson, 1 Duer 624 ; Griffith v. Brown, 3 Robt. 627 ; Aaron v. Baum, 7 Id. 340 ; Owen v. Ranstead, 22 Ill. 161 ; Rice v. R. R. Bank, 7 Hump. 39 ; also surprise, ignorance, etc: Roach v. Duckworth, 61 How. Pr. 128 ; Beveridge v. Hewitt, 8 Ill. App. 467 ; Miller v. Harrison, 32 N. J. Eq. 76 ; Stanton v. Embry, 46 Conn. 65 ; Markham v. Angier, 57 Ga. 43 ; Smith v. Pearce, 6 Baxt. 72 (the judge incompetent to sit.) Fail-

ure to summon, notify, or serve process on the defendant, so that he was ignorant of the proceedings against him : Crafts v. Dexter, 8 Ala. 767 ; Stubbs v. Leavitt, 30 Id. 352 ; Bell v. Williams, 1 Head. 229 ; Ridgeway v. Bank of Tenn., 11 Humph. 523, 525 ; Owens v. Ranstead, 22 Ill. 161 ; Harshey v. Blackmarr, 20 Iowa, 161 ; Walker v. Gilbert, Freem. (Miss.) Ch. 85 ; McNeill v. v. Edie, 24 Kan. 108 ; Ryan v. Boyd; 33 Ark. 778 ; Blakeslee v. Murphy, 44 Conn. 188. See Graham v. Roberts, 1 Head. 5659."

But a court of equity will more willingly and readily set aside decrees rendered by it, where fraud has intervened to procure it. No artifice or trick which prevents the doing of equity, will be allowed to be successful in a court of equity.

"*Wampler v. Wampler*, 30 Gratt. 454. Held, that a conveyance obtained by fraud may be set aside. Christian, J., said, (p. 459) : 'Courts of equity have an original, independent, and inherent jurisdiction to relieve against every species of fraud. Every transfer or conveyance of property, by what means soever it may be done, is in equity vitiated by fraud. Deeds, obligations, contracts, awards, judgments or decrees, may be the instruments to which parties resort to cover fraud, and through which they may obtain the most unrighteous advantages; but none of such devices or instruments will be permitted by a court of equity to obstruct the requirements of justice. If a case of fraud be established, a court of equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivance by which it may have been attempted to protect them. These principles have now become axioms of equity jurisprudence.'" (Note to Sec. 914, Pomeroy's Eq. Jur.)

"CANCELLATION OF JUDGMENTS AND OTHER JUDICIAL PROCEEDINGS, AND SUITS TO RESTRAIN ACTIONS AND JUDGMENTS AT LAW. THE JURISDICTION EXERCISED.—Dederer v. Voorhies, 81 N. Y. 153, (to set aside fraudulent proceedings of commissioners in making an assessment for a road); Hunt v. Hunt, 72 Id. 217 (what necessary in order to set aside a judgment for fraud); Jordan v. Volkening, Id. 300 (ditto); Ross v. Wood, 70 Id. 8 (ditto); Harbaugh v. Hohn, 52 Ind. 243 (judgment fraudulently taken for a larger sum than was due); Harris v. Cornell, 80 Ill. 54 (a fraudulent decree for the sale of land); Doughty v. Doughty, 27 N. J. Eq. (12 C. E. Green,) 315 (a judgment recovered in another state); Craft v. Thompson, 51 N. H. 536 (an award obtained by fraud); Holland v. Trotter, 22 Gratt. 156 (where party was prevented by fraud from setting up a good defense in the action at law); Babcock v. McCamant, 53 Ill. 214 (collection of a fraudulent judgment restrained; equity jurisdiction in fraud not lost because a statute has given a similar jurisdiction at law); Graham v. Roberts, 1 Head. 56, 59 (a judgment by default fraudulently obtained without service of process); Sayles v. Mann, 4 Ill. App. 516 (a judgment fraudulently obtained against a married woman); District, etc., of Algona v. District, etc., of Lott's Creek, 54 Iowa, 286 (a fraudulent award); Huxley v. King, 40 Mich. 73 (a fraudulent foreclosure and redemption thereunder)." (Continuation of note to Sec. 914, Pomeroy Eq. Jur.)

And also on the question of laches, Mr. Pomeroy, in the note to section 917, says this:

"It has sometimes been said that *actual concealment* is necessary, and that the mere fact of non-discovery is not enough. This cannot mean that the defrauded party must *necessarily* have used some affirmative means to discover the fraud, for *he might not have the slightest suspicion of its existence;* nor that the fraudulent party must *necessarily* have used some affirmative means to cover up his acts; nor that any *special* duty, such as a

trust or fiduciary relation, must rest upon the fraudulent party, different from that which rests upon such wrong-doers, to speak the truth. It can only mean that the defrauded party's ignorance must not be negligent; that he remains ignorant without any fault of his own; that he has not discovered the fraud, and could not by reasonable diligence discover it. If the statement means anything more than this, it is in direct conflict with the ablest authorities, and with the very principle upon which the rule itself is based. In Rolfe v. Gregory, *supra*, Lord Westbury said: 'As the remedy is given on the ground of fraud, it is governed by this important principle, that the right of the party defrauded is not affected by the lapse of time, or, generally speaking, by anything done or omitted to be done, *so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed.*' In Vane v. Vane, *supra*, James, L. J., said that the statute will not begin to run 'until the fraud is first discovered, or might with reasonable diligence have been discovered.' See also, Meader v. Norton, 11 Wall. 442; Township of Boomer v. French, 40 Iowa, 601; Humphreys v. Mattoon, 43 Id. 557; Reed v. Minell, 30 Ala. 61; Wilson v. Ivy, 32 Miss. 233; Buckner v. Calcote, 28 Id. 432; Hudson v. Wheeler, 34 Tex. 356; Munson v. Hallowell, 39 Id. 475; Peck v. Bullard, 2 Hump. 41."

ANALOGY TO THE STATUTE OF LIMITATIONS.

"Equity courts in cases of concurrent jurisdiction usually consider themselves bound by the statute of limitations which govern courts of law in like cases, and this rather in obedience to the statute of limitations than by analogy.

"When they (limitation acts) are addressed to courts of equity as well as courts of law, as they seem to be in

controversies of concurrent jurisdiction, they are equally obligatory in both forums as a means of promoting uniformity of decisions. (*Godden v. Kimmell*, 9 Otto, 201.)

"The question remains whether, *in general*, *laches* can be relied upon as a bar to a mere dry equitable demand falling within the purview of some or one of the statutes of limitations; and it seems that the legislature having prescribed a term of limitation which it deems sufficiently short, the court ought not further to abridge that term. (*Lewin on Trusts*, star page 873, Text-Book Series, top page 1069; see also top page 10 60; see also *Rockdale Canal Co. v. King*, 2 Sim. N. S. 89.)"

In Ohio the statute does not commence to run until the discovery of the fraud, and this statute applies to suits in equity as well as actions in law.

If the action, therefore, be based on relief on the ground of fraud, if the suit had been in the State court, it would not be barred, and the laches here complained of would not be available.

If a trust, it is not barred. If in the nature of an action to recover the property, thus wrongfully withheld, it is not barred until twenty-one years.

While it is true that the equity jurisdiction of the United States cannot be impaired or limited by State legislation, but is uniform throughout the United States, it is equally true, as announced in the adjudged cases, that courts of equity feel themselves bound, in cases of concurrent jurisdiction, by the statutes of limitations that govern courts of law in similar circumstances, and

that sometimes they act upon the analogy of the like limitation at law.

Kirby v. Lake Shore etc. R. R., 120 U. S. 130--139.

As a rule, and unless there are special circumstances which makes the particular case one which is abhorrent to equity, the courts of equity will not refuse relief on the ground of staleness, where for a long period there has existed a statute which regulates the time for bringing both actions at law and suits in equity, and the suit is brought within that period.

We do not claim that courts of equity of the United States are bound by such state statute, but that where the circumstances of a particular case do not demand a shorter time, there will be no disposition to favor a defense against active fraud upon lapse of time alone, where the statutory period has not intervened.

Under no statute in Ohio is this suit barred.

In *Sheldon vs. Keokuk Northern Line Packet Company*, 8 Federal Reporter, 769, it was held:

"As to the second point raised by the demurrer, that complainants, independent of any statute of limitations, have lost their right to relief by their delay in suing, I do not think it well taken. The authorities cited under this head by counsel for defendants apply to suits not strictly within any statute of limitations. The legislature here has declared that actions for relief on the ground of fraud, in cases heretofore solely cognizable by the court of chancery, 'may be commenced within

six years after the discovery of the facts constituting the fraud.' Administering the law in this suit, I do not think relief should be denied even if it appeared that the complainants might have applied for relief at an earlier date, when the frauds complained of were first discovered. The court should not assume or infer unreasonable delay, after such discovery, from the isolated fact that the fraud charged was committed several years before the commencement of the suit. It is consistent with the bill that the fraud, and the facts constituting the fraud, were not discovered until some time after they were committed. If the doctrine of laches or lapse of time can ever be asked in a suit as to which there is a statute of limitation prescribing the period within which such suit may be commenced, a demurrer, insisting upon lapse of time short of the statutory period, should not be sustained, unless the bill upon its face, without resorting to inferences, makes a clear case of unreasonable delay, upon the part of the complainants, after the discovery of the fraud charged."

STATUTE OF LIMITATIONS.

We know no statute of limitations that stands in the way of our rights to maintain this suit. Certainly there is none passed by the Congress of the United States, and if there is any, it must be found in the state laws.

Section 4982 of the Revised Statutes of the State of Ohio, limits to four years.

"An action for relief on the ground of fraud: but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

Formerly the latter clause was not in the statute, but the four years was an absolute bar.

But under such absolute statute, courts of equity acting not in *obedience* to the statute, but in *analogy* to it, would not count or consider the time prior to the discovery of the fraud, but would, in cases where they applied it at all, commence at the date of such discovery.

Longworth v. Hunt, 11 O. S. 194. *Williams v. First Pres. Society*, 1 O. S. 478. *Ormsby v. Longworth*, 11 O. S. 663.

But the statute by express terms provides, that in no case, *at law or in equity*, does the statute commence to run until the discovery of the fraud.

Of course, the provisions of chapter 6, of title 1, division 4 of the revised statutes, sections 5354 *et seq.* do not affect this court in its equitable jurisdiction or practice. Those sections provide an additional and speedy remedy in the cases covered by them, and are remedial in their nature, not in any sense abrogating any right which the parties may have to pursue any course authorized by courts of equity. They provide that a Court of Common Pleas, Superior or Circuit Court, may vacate or modify its own judgment or order after that term at which it was made. Sec. 5354:

"4. For fraud practiced by the successful party in obtaining the judgment or order."

This remedy is limited by Section 5363 to two years after the judgment was rendered.

In *Coates v. The Chillicothe Bank*, 23 O. S. 415, it was decided by the Supreme Court of Ohio—

"That the power conferred by this Section to vacate or modify their own judgments or orders at any time after which they were rendered for fraud practiced by the successful party, does not abridge the right to maintain an original action impeaching a judgment or decree for fraud." See also *Long v. Mulford*, 17 O. S. 484.

The limitations found in this chapter is only a limitation to the remedy, provided in that chapter, and applies only to the additional remedy granted.

We know of no other statute of limitations on the subject, or which, it can be claimed, applied to the present suit.

It is quite clear, therefore, that a court of equity in a case like the present one, whether it acts in obedience, or analogy to the statute, is not required to consider any lapse of time existing prior to the discovery of the alleged fraud in determining the right to relief.

In the cases to which attention will be called, the statute was, generally, an unqualified limitation like that in Ohio before the amendment to the section above given.

For the decisions under the former statute, see

4 Ohio, 331.
10 Ohio, 469.
6 Ohio State, 276.

And see also—

19 Ohio State, 462.
10 Ohio State, 198.
17 Ohio State, 485.
32 Ohio State, 228.
26 Ohio State, 559.

Showing the effect of this amendment.

All that is necessary under this statute, as decided in Combs v. Watson, 32 Ohio State, 234, is to plead the fraud, and allege that the fraud was unknown until within the time allowed by the statute.

While we deem it unnecessary, therefore, to review the authorities based upon the analogy adopted by courts of equity to the statute of limitations, where knowledge of the fraud was always made an essential, we nevertheles consider many of them hereafter as a matter of illustration and convenience.

The courts of equity have never permitted one who conceals from another the facts which establish his right, to interpose the objection of staleness of his claim, when asserted in a reasonable time after discovery. And while equity will not favor stale demands, it will never consider a claim as stale which has been

caused to lie dormant by the active concealment of the facts, by the party against whom they are to be asserted.

We will consider the limitations, the effect of want of knowledge, the rule in equity, and staleness, together, in the citations which follow.

THE RULE IN EQUITY.

In *Stearns, Admr., v. Page*, 7 Howard, page 829, Mr. Justice Grier, referring to the application of the statutes of limitations in courts of equity, says:

"They also interfere, in many cases, to prevent the bar of the statutes, where it would be inequitable or unjust; as, for example, if a party has perpetrated a fraud, which has not been discovered till the statutable bar may apply to it in law, courts of equity will interfere and remove the bar out of the way of the injured party."

Again, in the case of *Bailey v. Glover*, 21 Wallace 336, where a bill in chancery was brought by the assignee of Benj. Glover, a bankrupt, to set aside as fraudulent and void, conveyance of real estate by bankrupt to defendants, a demurrer to complainant's bill was sustained by the District Court, because the suit was not brought within two years from the appointment of the assignee, and bill dismissed. An appeal was taken to the Supreme Court, and in the opinion, reversing this

decision of the District Court, given by Justice Miller, the court say:

"In referring to the second section of Bankrupt Act, which section provides for the commencement of all suits at law or in equity brought by the assignee against a person claiming an adverse interest, etc., the same shall be brought within two years from the time the cause of action accrued for or against such assignee.

"This is a statute of limitation; it is precisely like other statutes of limitation, and applies to all judicial contests between the assignee and other persons, touching the property or rights of property of the bankrupt transferable to or vested in the assignee, where the interests are adverse and have so existed for more than two years from the time when the cause of action accrued for or against the assignee."

As an action for or against an assignee could not accrue until his appointment, and as the action in the case cited was not brought within the statutable limit, it would appear to act as a positive bar, but here the court interpose and remove the bar in the following concise language:

"In suits in equity, where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by the affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief, provided the suit is brought within proper time after the discovery of the fraud.

"*We also think, that in suits in equity, the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care*

on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances, or efforts on the part of the party committing, to conceal it from the knowledge of the other party.

"As the case before us is a suit in equity, and as the bill contains a distinct allegation that the defendant kept secret and concealed from the parties interested, the fraud which is sought to be redressed, we might rest this case on what we have said is the undisputed doctrine of the courts of equity, but for the peculiar language of the statute, we are considering. We can not say, in regard to this act of limitations, that courts of equity are not bound by its terms, for its very words are that no suit at law or in equity shall in any case be maintained unless brought within two years, etc. It is quite clear that this statute must be held to apply equally by its own force to courts of equity and to courts of law, and if there be an exception to the universality of its language, it must be one which applies under the same state of facts to suits at law as well as to suits in equity."

In this case the same court says further:

"To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law, which was designed to prevent fraud, the means by which it is made successful and secure."

Chancellor Bates, of Court of Chancery of Delaware, in the case of *Sparks vs. Farmers Bank, American Law Register*, N. S. Vol. 9, 381 and 382, most emphatically held the same view, and said :

"Their equity to do so arises out of the fact that the defalcation was a fraud, concealed from the Bank, with respect to which a court of equity will not permit the

statutory bar to be set up until the lapse of the prescribed term after the discovery of the fraud."

And further adds :

"*But most especially does equity relieve against any attempt to use the statute as a cover for fraud.*"

Ohio courts sustain the same principle and in the case of *Longworth vs. Hunt et al.*, 11 O. S. 201 and 202, where the statutory bar was pleaded by the parties to the fraud, Chief Justice Brinkerhoff, says :

"An attempt to set up the lapse of time by Benjamin V. Hunt in defense, would be most unconscionable ; and, being at liberty to close our ears against it, we are unwilling to listen to it, when it comes from those who represent him."

This principle is sustained in later Ohio decisions, notably in *Long, et al., vs. Mulford, et al.*, 17 Ohio State, 509, where in the argument made for the complainants, by such an able jurist as Mr. Stanley Matthews, he disposes of a plea of the statute, as follows :

"But lapse of time is pleaded, and this may constitute a bar in a court of equity, either on the ground of analogy to the statute of limitations of actions at law, or on that of simple staleness of demand. But in cases of this kind, the statute does not commence running until the discovery of the fraud."

And the court sustained the point, although in that case twenty years had elapsed since the fraud charged in complainant's bill was perpetrated. In the same case, Mr. Matthews, and others with him, argue that where

there is positive fraud, the longest period will be allowed, and support that argument, by citations to the following cases: *Michaud, et al., vs. Girod, et al.*, 4 Howard, 503; *Oliver vs. Piatt*, 3 Howard, 333; 4 Dessaus, 651; 2 Gill, 163.

So in *Piatt, et al., vs. Longworth, et. al.*, 27 Ohio State, on page 199, the same rule is followed; also in *Combs vs. Watson*, 32 O. S. 234, Chief Justice Day says:

"No matter when the cause of action accrued, for the purpose of applying the limitation of the statute, it shall not be deemed to have accrued until the discovery of the fraud."

And this is sustained in *Carpenter vs. Canal Company*, 35 O. S. page 317, last paragraph; also in *Maple vs. Railroad Company*, 40 O. S. 313, where complainant's bill charged a fraud committed at times between January 14, 1870, and April 5, 1876; discovery was not made until April, 1876; action was begun September 30th, 1878, defendant answered setting up statute of limitations as a cause of defense, averring:

"That the causes of action in said plaintiff's petition set forth, did not accrue to the said plaintiff against the defendant within four years next before the commencement of this action. Wherefore the same is barred by the statute of limitations in that behalf, in this, that its frauds complained of, if committed by said agent, were committed by him as such agent, at a time then four years prior to the commencement of this action in this court."

To this defense, the plaintiff demurred, and court be-

low overruled demurrer. Plaintiff excepted and the case was carried to the Supreme Court ; and in the opinion reversing the lower courts and sustaining the demurrer of plaintiff, the court say:

"The second defense says, that the cause of action did not accrue within four years, because the fraud was not committed within four years. This mode of putting it admits the truth of the averment in the petition, that the fraud was not discovered until April, 1876. As we think the statute did not begin to run against Maple until he had discovered the fraud, the plea was not broad enough to cover the case stated by the petition, and the demurrer to it should have been sustained."

So in 1 Ohio State, 505, where defendants had demurred and set up lapse of time, Judge Thurman said :

"It is undoubtedly true that there are cases of fraud that render this defense unavailable ; as, where a person has been misled by the misrepresentations of another, or kept in ignorance of his rights by *one who ought to have disclosed them.*"

Mr. Justice Story said in case of Provost vs. Gratz, 6 Wheat. 498 :

"It is certainly true, that length of time is no bar to a trust clearly established ; and in a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief ; on the contrary, it would seem that length of time, during which the fraud has been successfully concealed and practiced, is rather an aggravation of the offense, and calls more loudly upon a court of equity to grant ample and decisive relief."

In certain cases, the same eminent authority rightly

modifies this principle, and adds, (as to the case then at issue, wherein forty years was considered too long a time) :

"But length of time necessarily obscures all human evidence ; and as it thus removes from the parties all the immediate means to verify the nature of the original transaction, it operates by way of presumption, in favor of innocence, and against the imputation of fraud."

But in the case before your Honors, no such length of time has elapsed, the evidence is not obscured, nor are the means of verifying the allegations of the bill removed ; contra, the same parties who perpetrated the fraud are now before this court, the means of verifying the charges are accessible and can be produced ; hence, there is no cause assignable that would permit of the application of the exception cited by Justice Story, *but rather is it a case that distinctly comes under the class that calls more loudly upon a court of equity to grant ample and decisive relief.*

In *Moore vs. Hawkins et al.*, 19 Howard 69, the court in affirming the decree of the lower court, wherein complainant's bill had been dismissed, said :

"The statute does not begin to run until the fraud is discovered, but in such a case the bill must be specific in stating the facts and circumstances which constitute the fraud, and also as to the time it was discovered. This is necessary to enable the defendant to meet the fraud, and the alleged time of its discovery. In these respect the bill is defective, and the evidence still more so. For this latter reason, then, the decree of dismissal is affirmed."

Here the court established a more stringent rule in regard to pleadings than had theretofore prevailed; yet the plaintiff in the present case is so situated, by the distinct and specific allegations of his charges of fraud and discovery, as to clearly come under the exceptions recognized in that decision.

So in *Wood vs. Carpenter*, 11 Otto, 135, an action at law, wherein the complainant averred that the concealment was effected by the defendant by means of fraud, perjury, and other wicked devices set forth and described in plaintiff's petition herein; and that the plaintiff had no knowledge of the facts so concealed by defendant, until the year 1872, and a few weeks only before the commencement of this suit. The defendant demurred thereto, and Mr. Justice Swayne, affirming the decree of the Circuit Court for District of Indiana, sustaining the demurrer, observed, among other things:

"A party seeking to avoid the bar of the statute on account of fraud, must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it."

And—

"Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and inquiry. The court also held same view in Bank vs. Carpenter, 11 Otto, 567, an equity case."

This position appears in direct conflict with the principle adopted in the case of *Bailey vs. Glover*, 21 Wallace, 342; heretofore referred to; and in a comparison of

the decision in *Rosenthal vs. Walker*, 111 U. S., 185, the court say:

"The case of Bailey vs. Glover is a decision construing the statute which is relied on in this case, and unless subsequently over-ruled by this court, is conclusive of the point under discussion. It has never been over-ruled.

"The plaintiff in error relies on the case of *Wood vs. Carpenter*, 101 U. S. 135, and *Bank vs. Carpenter*, 101 U. S. 567. The first was an action at law; the second a suit in equity. The court in both cases was called on to construe the statute of limitations of the State of Indiana, and it followed the adjudications of the Supreme Court of that state upon the same statute. Neither case refers to the opinion of the court in Bailey vs. Glover, or can be held to over-rule or modify it. The case of Bailey vs. Glover has been often cited by this court, but has never been doubted or qualified."

See *Gifford vs. Helms*, 98 U. S. 248; *Upton vs. McLaughlin*, 105 U. S. 640.

In the case of *Traer vs. Clews*, 115 U. S. 528, the statement of the case by Justice Woods shows that that Henry Clews, defendant in error, commenced a suit January 17th, 1878, against Traer et al., to recover the value of certain personal property. The petition showed that Clews was the original owner of stock in a construction company to the amount of $50,000, on which dividends had been declared to the amount of $10,000 in December, 1873, and $500 in January, 1874, and were in the treasury of the company ready to be paid out to the holder of stock. On November 28th, 1874, Clews was

declared a bankrupt, and his stock passed to one Tappan, as trustee of the estate. In February, 1875, the construction company went into voluntary dissolution and liquidation, and Traer and others were appointed trustees, Traer knowing that dividends had been declared, and the same being unknown to Clews and Tappan, his trustee in bankruptcy, he (Traer), on the 4th of March, 1876, bought, through the intervention of another party, the stock of Tappan, the trustee, for $1,200. Afterward Tappan, assuming that the sale was void for fraud, sold all his claims and demands on account of the stock to Clews, who thereupon brought suit as above stated. Traer et al., who had been officers and trustees of the construction company, were made defendants. The defendants demurred on the ground that the petition did not state facts sufficient to entitle the plaintiff to the relief demanded. The court overruled the demurrer, and Traer went to the Supreme Court on error. The decision given by Mr. Justice Woods, to which we wish to call the attention of the court, as sustaining the opinions heretofore cited in favor of this complainant's right to relief as prayed in his bill, says:

"The case is substantially the same, so far as the question now in hand is concerned (meaning the demurrer which set up lapse of time), as that of Bailey vs. Glover, 21 Wallace 342.

"The averment of fraudulent concealment in that case was, as shown by the report, as follows: The bill alleged that the defendants kept secret their said fraudulent acts, and endeavored to conceal them from the knowledge, both of the assignee and of the said Winston &

Co., creditors of said bankrupt, whereby both were prevented from obtaining any sufficient knowledge or information thereof until within the last two years, and that even up to the present time they have not been able to obtain full and particular information as to the fraudulent disposition made by the bankrupt of a large part of his property. The court, in that case, upon the demurrers, held in effect that these averments were sufficient to take the case, from the operation of the same limitation which is set upon in this case."

In delivering the opinion of the court, Mr. Justice Miller said:

"We hold that where there has been no negligence or laches on the part of the plaintiff in coming to a knowledge of the fraud, which is the foundation of this suit, and when the fraud has been concealed, or is of such a character as to conceal itself, the statute does not begin to run until the fraud has been discovered, or becomes known to the party suing, or those in privity with him."

"So in the case of *Rosenthal vs. Walker*, 111 U.S. 185, an averment of like nature was held sufficient to take the case out of the bar prescribed by the statute. The case of Bailey vs. Glover has never been overruled, doubted or modified by this court; on the contrary, in Rosenthal vs. Walker, it was reaffirmed, and was distinguished from the case of Wood vs. Carpenter, 101 U. S. 135, relied on by the appellants. The authorities cited are in point, and fully support our conclusions that upon the pleadings and evidence the suit of the plaintiff was not barred by the limitation prescribed."

That this doctrine is the universally established rule of equity, see recent opinion of court in *Kirby vs. Lake Shore R. R., etc.*, decided January 10th, 1887, 120 U. S. 130. In this case, Mr. Justice Harlan says:

"It is an established rule of equity, as administered in courts of the United States, that where relief is asked on the ground of actual fraud, especially if such fraud has been concealed, time will not run in favor of the defendant until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered;" and cites *Meader vs. Norton*, 11 Wallace, 442, 458; *Provost vs. Gratz*, 6 Wheat. 481; *Michaud vs. Girod*, 4 Howard, 503, 561; *Veazie vs. Williams*, 8 Howard, 134, 149, 158; *Brown vs. Buena Vista*, 95 U. S. 157; *Rosenthal vs. Walker*, 111 U. S. 185, 190; *2d Story Equity Jurisprudence*, section 1521*a*; *Angell on Limitations*. The court also cites at length the clause heretofore referred to in the case of *Bailey vs. Glover*, 21 Howard, 342, 347; also *Traer vs. Clews*, 115 U. S. 528, 538.

"We also think that in courts of equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it, without any fault or want of diligence on his part, the bar of the statute does not begin to run until the fraud is discovered, *though there be no special circumstances or efforts on the part of the party committing the fraud, to conceal it from the knowledge of the other party.*"

And Justice Harlan, in commenting on the decisions, says:

"These observations were made with reference to an act of Congress, prescribing a fixed time within which a suit between an assignee in bankruptcy and persons asserting adverse rights in property conveyed to such assignee, should be brought. They are peculiarly applicable to a local statute which, if followed, would impair the power of the courts of the United States to enforce the settled principles of equity in suits of which they have, by the constitution and the laws of the United States, full jurisdiction."

This was just one of those frauds which, in *Bailey vs.*

Glover, and in *Kirby vs. Lake Shore, etc., R. R.*, it is said, conceals itself, and which, until actual discovery, time will not run against.

Look at it: A solemn decree of the Circuit Court of the United States is the means used to consummate the fraud. It is to lull the stockholders from suspicion. It is to have all the force and solemnity, as to the security which such decrees give, as against any possible suspicion of wrong. The sanction of the court to the average man means that is has received the examination and decision of the court and that all questions have been adjudicated and determined. No one would suspect or is bound to suspect that the court has been imposed on. No one would suppose that the decree and sale was open to any charge of being fraudulently procured. No means of concealing the fraud could ever be so available and successful. The fact that a defense was attempted and withdrawn only made it the more easily concealed and less liable to suspicion.

Graham vs. Borton, Hartford & Erie R. R. Co., 118 U. S., 162, *et seq.*, was decided upon facts so entirely different from those alleged in the present bill that it has no effect as an authority in this case. While the bill in that case charged fraud in obtaining the decree, the fraud alleged was,

"By submitting to the court false statements of facts for its decision and thus obtaining a decree against the company."

The bill did not allege in what particulars the statements were false; it did not allege that there was not a breach of the condition of the mortgage, nor that the plaintiffs were not the actual holders of the bonds; nor that the interest was ever paid; nor any offer or suggestion of redeeming the mortgage. No allegation that the new corporation, purchaser, had any knowledge of the fraud, and above all, the decree was in the state court and application was never made to that court to set it aside, which was still open to listen to the complainant. The decree being still interlocutory and open to review upon petition, motion or Bill of Review. And there does not appear to be any reason given in the bill for the delay. The bondholders in that case were bona fide holders, and their rights to a foreclosure not questioned. Hence, the case has no application here.

The principle that laches cannot be imputed to one defrauded by the perpetrator of the fraud is as wholesome now as it ever was.

"Where fraud is clearly proved, it should never be allowed to shield itself behind defenses that are purely technical."—Wait's Actions and Defenses, Vol. 3, 476.

Lord Erskine said:

"No length of time can prevent the unkennelling of a fraud."

Lord Northington, in *Alden vs. Gregory*, 2 Eden, 285:

"The next question is in effect whether a delay will

purge a fraud. Never, while I sit here. Every delay adds to its injustice and multiplies its oppression."

Justice Story, in *Provost vs. Gratz*, 6 Wheaton, 481:

"It is certainly true that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not on principles of eternal justice, to be admitted to repel relief. On the other hand, it would seem that the length of time during which the fraud has been successfully concealed and practiced, is rather an aggravation of the offence, and calls more loudly upon a court of equity to give ample and decisive relief."

Justice Grier, in Badger vs. Badger, 2 Wallace, 87, says these principles are correct, but the qualifications must be noted.

These are simply that the frauds must have been concealed from the knowledge or the *cestui que trust*, to excuse unusual delay. That is, the defranded party must move diligently after discovery.

While on this question let us enquire whose duty was it to make known these facts? The directors of the Mansfield Company were trustees for the stockholders, and were controlled and influenced by their real employer, the Pennsylvania Company. The complainants were trustees, in one sense, for both the corporation and the bondholders. They were agents and under control of the same power. The solicitor was a director of the Mansfield Company, but acting solely in the interest of the same power. But the fact that the Pennsylvania

Company put its agents into these various positions of trust, did not exempt them from the duties of such positions. One, and the most important of those duties, was, that a complete and thorough disclosure of the facts which affected the rights of the stockholders and company should be made. The concealment of matters of right, or matters of defense, from the company, was a part of the fraud, and every day's concealment a continuation of the fraud.

We are not seeking to affect any one who purchased or parted with anything relying on our silence. We are not affecting any one's interests but those of the parties engaged in this concealment. Will they be heard to say we are guilty of laches? That our demand was stale? It was their duty to make full disclosure. It was our right to rely on their having done so. No one is bound to suspect that his agent is committing a fraud, and the agent will not be heard to say:

"You relied upon my honesty and slept on your rights; now that you have discovered that I betrayed my trust and obtained your property thereby, you can not be heard in a court of equity because your demand is stale."

"Where a *defendant* has suffered no prejudice by delay in bringing an action, and the plaintiff's demand is not barred by the statute of limitations, and the latter also furnishes a satisfactory excuse for not commencing the suit earlier, a demurrer will not lie for laches."—Pacific R. R. vs. Atlantic & P. R. R. Co., 20 Fed. Rept. 277.

See *Kilbourn vs. Sunderland, 130 U. S. 505; Bryan vs. Kales, 134 U. S. 126.*

TRUSTS, AND LACHES AS APPLIED THERETO.

There is another ground upon which the right of the plaintiff to relief may be safely placed, and that is by raising in the defendants an equitable or constructive trust in respect to the property in controversy.

Trusts of this description depend upon the conclusions of law independently of contract, and often arise in cases where there was no intention to create a trust on the part of the parties concerned; generally speaking they are imposed *in invitum.*

1 Spence's Equity (side), *509.*

A court of equity will not permit any person standing in a fiduciary situation, or who, from the relation in which he stands to another, is capable of exercising an undue influence over his mind, to derive profit from any transaction which takes place during the continuance of such fiduciary character in the one case, or which may be supposed to have taken place by reason of such opportunities of undue influence in the other.

1 Spence's Equity (side), *626.*

Mr. Hill, in his work on Trustees, thus broadly states the principle upon which the court acts:

"Wherever the circumstances of a transaction are such that the person who takes the legal estate in property can not also enjoy the beneficial interest without

necessarily violating some established principle of equity, the court will immediately raise a constructive trust and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties who in equity are entitled to the beneficial enjoyment."— Hill on Trustees (side), 144, 2nd American Edition, 197.

Lakin v. Sierra Buttes Gold Co., 25 Fed. Rep. 337.

That the decree in the case is no bar to such a trust was held in Long vs. Mulford, 17 Ohio State, 485.

We ask the court's especial attention to that case.

It may be, and probably is, necessary, as was done in that case, to set aside the decree, but the possession of the defendants will be held to be the possession of the beneficiaries entitled thereto, and hence, we make to our bill all parties who now claim any interest in the property, including those who were implicated in the fraud charged.

The rule asserted by Mr. Hill, above referred, is found clearly stated in Pomeroy's Equity Jurisprudence, section 1044 *et seq.*, and the numerous notes in support thereof, and section 1052 gives a number of instances similar in principle to the case at bar, where such trusts were implied and imposed upon the property and the trustee.

Section 1053, in continuation of the subject, and treating of trusts *ex maleficio*, says :

"In general, whenever the legal title to property,

real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness, or necessities, or through any other similar means, or under any other similar circumstances which render it unconscientious for the holder of the legal to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired, in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property, either in the hands of the original wrong-doer, or in the hands of any subsequent holder, until a purchaser of it takes in good faith, and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts which are termed *ex maleficio*, or *ex delicto*, are practically without limit. The principle is applied wherever it is necessary for the obtaining complete justice, although the law may also give the remedy of damages against the wrong-doer."

It would be impossible to give anything like a complete resume of the instances in which this remedy has been afforded by courts of equity, and we can only refer thus generally to the principle asserted by the authors, and supported by the numberless cases cited by Mr. Pomeroy.

Now, if what is alleged in the bill amounts to fraud, and the decree and sale were obtained by that fraud, then, although the legal title may be vested in these parties, yet this trust is impressed upon it, and continues and subsists until the constructive trust thus created is discharged. In other words, the decree which we seek to set aside, and the deeds made thereunder, are the

mere naked forms vesting the legal title in the purchasers, who are guilty of the fraud. Possession has been taken under these forms. But we need not argue that if they were created, or obtained by fraud, then they are void. The parties are as if the forms had never existed. The decree and sale do not stand in the way of the parties. But the action of the court granting them is necessary simply to declare them void.

No statute of limitations, of course, can apply to such a case. Our section 4974 provides that the chapter on limitations shall not apply

"In a case of continuing and subsisting trust."

In Carpenter vs. The Canal Company, 35 Ohio State, 317, the court say, after stating the rule under this statute:

"The courts will sometimes make use of the machinery of a trust to aid an injured party in obtaining property, the title to which has been acquired by another by fraudulent means. The guilty party is sometimes called a trustee *ex maleficio.*"

Bispham's Equity, Sec. 91.

Besides, if there was an open disavowal of the trust, and by open I mean a disavowal to the *cestui que* trust, so that he knew that the trust existed, and it was repudiated, then the twenty-one year statute alone would be applicable.

Paschall vs. Hinderer, 28 O. S. 580.

It should be borne in mind that during the period elapsing between the foreclosure suit and the filing of the present bill, that the Mansfield Company, was so far as its board is concerned, in the hands of these defendants. That no reports were ever made to the company, or its stockholders. That no information was ever given to them of the facts which constituted the defense to the foreclosure suit; that the records of the company were to keep out of their reach; that the property was sold under a decree of the court, which to the ordinary mind forecloses relief, and the active action of the parties to keep knowledge from the stockholders.

We recognize the fact that equity does not encourage stale demands or claims, and that is requires promptness and diligence on the part of its suitors. *But no application of an equitable rule will ever be permitted to work inequity.* What is diligence, or what constitutes a stale equity, are questions which depend upon the facts and circumstances of each case, and not on lapse of time alone.

Paschall vs. Hinderer, 28 O. S. 568.

Staleness of a claim cannot be asserted in equity where the action is brought within the period of the statute of limitations, unless some special circumstances exist making it inequitable to grant the relief. A claim never becomes stale as against a wrong-doer where the inaction is induced by the wrong complained of. One who chloroforms the senses into inactivity cannot urge

that inactivity as a defence to rights asserted when its influence is removed.

Laches presupposes knowledge or neglectful ignorance. Where the party is ignorant of his rights, and is guilty of no negligence, he can never be said to be too late in asserting his claim when he does it upon learning of them, until some statute of limitation bars him. And this without reference to fraud or concealment. But much less it be said that his demand is stale when by the fraud of the party adverse to him he has been prevented from sooner asserting them.

"Where there has been a spoliation or suppression of instruments, which might have thrown light upon a suit, everything will be presumed against the party by whose agent such spoliation and suppression have been practiced, and every presumption will be made in favor of the prima facia rights of the other party." Kerr on Fraud and Mistake, page 275.

Remember that no new rights have intervened to make it inequitable to grant relief. Every legal or equitable claim arising out of the original transactions or accruing since can be determined upon the principle of doing equity to every party to the suit. No innocent purchaser has intervened; no alteration in the position of the parties which prevents full relief; no one is in a position to assert that by laches or staleness, the claim cannot now be equitably enforced.

All instances of this class, in equity, rest upon the principle.

"*If one maintain silence, when in conscience he ought to speak, equity will debar him from speaking, when in conscience he ought to remain silent.*" 2 Pom. Sec. 818; 38 Mich. 475, 480.

All that equity requires is reasonable diligence. Have we not shown that by our bill under the admitted allegations thereof?

It has sometimes been said that actual concealment is necessary, and that the mere fact of non-discovery is not enough. This cannot mean that the defrauded party must necessarily have used some affirmative means to discover the fraud, for he might not have the slightest suspicion of its existence. Nor that the fraudulent party must necessarily have used some affirmative means to cover up his acts; nor that any special duty, such as a trust or fiduciary relation must rest upon the fraudulent party, different from that which rests upon all such wrong-doers to speak the truth.

It can only mean that the defrauded party's ignorance must not be negligent; that he remains ignorant without any fault of his own; that he has not discovered the fraud and could not by reasonable diligence discover it. If the statement means anything more than this, it is in direct conflict with the ablest authorities, and with every principle upon which the rule is based.

In Rolfe vs. Gregory, *supra*, Lord Westbury said:

"As the remedy is given on the ground of fraud, it is governed by this important principle, that the right of

the party defrauded is not affected by the lapse of time, or generally speaking, by anything done, or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been comitted."

In Vane vs. Vane, *supra*, James L. J. said that the statute will not run,

"Until the fraud is first discovered, or might with reasonable diligence have been discovered."

See also *Meader vs. Norton, 11 Wallace, 442.*
Tp. of Boomer vs. French, 40 Ia. 601.
Humphreys vs. Mattoon, 43 Ia. 556.
Reed vs. Minell, 30 Ala. 61.
Wilson vs. Ivy, 32 Miss. 233.
Buckner vs. Calcate, 28 Id. 432.
Hudson vs. Wheeler, 34 Tex. 356.
Munson vs. Hallowell, 26 Id. 475.
Peck vs. Bullard, 2 Hump. 41.

Besides, it is unusual to raise the question of staleness or laches by demurrer. In the case of Burnley *et al.* vs The Town of Jeffersonville *et al.*, 3 McLean's Reports, the court say:

"The allegations of the bill, by the demurrer, are admitted to be true. It is admitted that the four lots, from 193 to 196 inclusive, were fraudulently conveyed by the trustees, and without consideration; and that the grantees had notice of Bowman's claim. It is also admitted that many lots have been sold under the new plan of the town, as well as under the old, and that the proceeds have never been paid to Bowman in his lifetime, or to his devisees since his death; and also that there are lots unsold, which the claimants pray may be

decreed to be conveyed to them. The death of Bowman, his devise to his children, and the purchase of Burnly, are also admitted. Now, under this aspect of the case, it is difficult to say that the bill is without equity. No circumstance — such as lapse of time, the statute of limitations, or any other ground of defense — can be taken into consideration on demurrer. In this view, then, it is not perceived on what ground the demurrer can be sustained. The allegations of fraud must be answered. The demurrer is, therefore, overruled, and the defendants are required to answer the bill."

Although the rule is established that where the laches or staleness clearly appears in the bill, it may be raised by demurrer.

Bryan vs. Kales, 134 U. S. 126.

Before leaving this question of trust, we ask the court's attention to the case already cited of *Larkin vs. Sierra Buttes Gold Mining Company*, 25 Federal Reporter, where the doctrine as found in the text books above quoted is affirmed, and where also the question of laches and limitations is discussed.

DEFENDANTS' POINTS.

Counsel for defense, in support of their demurrer, rely entirely upon these propositions:

***First.*—That our bill does not show any fraud; that its allegations are vague and uncertain.**

Second.—That even if true, they were entitled to a foreclosure, because of a failure to provide the sinking fund.

Third.—That under the decisions of the Supreme Court of the United States, we are guilty of such laches that we will not now be heard.

In view of what we have already said, it is unnecesary to notice these propositions further than to refer to the authorities cited in their support.

Badger vs. Badger, 2 Wallace, 87, was a case where a delay of about forty years in attacking an administration account and a sale of land under a decree, and the court say:

"The statement of his case shows clearly that he must have known, or could have known, if he had chosen to enquire at any time in the last thirty years of his life, every fact alleged in the bill. That his mother was entitled to dower in the land, if the sale was set aside, was no impediment to his pursuit of his rights, while her death may have removed the only witness who was able to prove that his complaint of fraud was unfounded, and that it was by the consent and desire of the family that the property was kept in the family name by the only one who was able to advance the money to pay the debts of the deceased—a fact fairly to be presumed from her silence and acquiescence for twenty-four years."

No better illustration of the difference between that case and the one at bar can be given than by quoting the opinion of Justice Grier, wherein he distinguishes it from the case of Michoud vs. Girod, as follows:

"The case of *Michoud vs. Girod*, 4 How. 503, is an example of the class in which the concealment of the fraud was the aggravation of the offense. The facts of the case were 'clearly established' by records and other written documents, and the court were not called on to found their decree on the frail memory or active imaginations of ancient witnesses, who may not be able, after a great lapse of time, to distinguish between their faith and their knowledge; between things seen or heard by themselves, and those received from family or neighborhood gossip, or upon that most unsafe of all testimony, conversations and confessions—remembered or imagined —partially stated or wholly misrepresented. The fraudulent concealment was also clearly established. The heirs, who lived in Europe, were deceived by the false representations of the executor, and kept in total ignorance of the situation and value of the estate, having no other information on the subject than that communicated to them by him. The delay was not the consequence of any laches in the heirs, but was caused by the successful fraud of the executor, and was but an aggravation of the offense.

"But the case before us has none of the peculiar characteristics of those to which we have referred. In 1818 Daniel Badger died, leaving ten children. Administration was granted to Daniel B. Badger, the eldest son, and Joseph Badger, the brother of the deceased. The other heirs were at that time minors. The administrators filed inventories of the estate, its debts and liabilities, and had leave to sell certain portion of the real estate. In 1827 a further account was filed, which had the written approval of the widow and heirs, the minors acting by their guardians. The bill charges that this account was fraudulent, and that the estate was not liable for the debts therein stated; that in 1830 the administrator obtained an order to sell certain portions of the estate to pay the debts. It charges that he silenced the objections of some of the heirs, who objected to the order, by purchasing their shares, and procured the signature of the widow fraudulently, by the use of which he obtained

from the court the orders to sell; that in March, 1831, the property was sold at auction, and bid in by persons who conveyed it to the administrator. For more than twenty-five years the widow and heirs have acquiesced in this sale, and it is more than thirty since the administration account was settled, which was alleged to have been fraudulent. The guardian of the complainant, who approved the account, is dead; the widow died in 1855. Two of the heirs were of full age in 1831, and the others afterwards. This bill was filed in 1858. The bill does not state the age of the complainant, but at the time of filing his bill he must have been over forty years of age.

"The whole transaction was public, and well known to the widow, and to the heirs and their guardians. The purchase of the estate by the administrator could have been avoided at once, if any party interested disapproved of it. There was not and could not be any concealment of the facts of the case. The complainant claims as assignee of his elder brothers and sisters, and uses them as witnesses to prove the alleged fraud, after a silence of over thirty years. They attempt to prove the signature of their mother, to the documents on file in the court, to be forged, and this after the death of the mother, who lived for twenty-eight years after the transaction without complaint or allegation either that her signature was fraudulently obtained or forged. A daughter who was twenty three years of age when this sale was made, and had full knowledge of the whole transaction, after nearly thirty years' silence, now comes forward to prove that her concurrence and assent was obtained by fraud. And now, after the death of the guardian and the mother, who could have explained the whole transaction, the aid of the court of chancery is demanded to destroy a title obtained by judicial sale, after the parties complaining, with full knowledge of their rights, have slept upon them for over a quarter of a century."

In commenting on this case, counsel urged that the trustees were now dead. We are not to blame for that.

We filed our bill, and had personal service on Cass, one of them. But the distinguished solicitors, who ought to know all about these matters, are alive. The majority of the directors are alive; the written documents and records are preserved; the railroad which the Pennsylvania Company agreed to build, and which it now claims to own, although grass and moss-grown from disuse and decay, is still there. The work done by the Pennsylvania Company is easily ascertained,—the part of the road put into its system and its value easily shown. No evidence is lost; no harm done by the delay. Besides, the chancellor can take all these things into consideration in weighing whether the allegations are so clearly proven as to require the granting of the relief prayed for. In the Badger case there was no demurrer, but an answer was filed to the bill.

Harwood vs. The Cin. & Chicago Air Line R. R., 17 Wallace, 78, throws no light upon the question here involved. The court simply announced that in that case the—

"Allegations of ignorance is in general terms of the fraudulent acts and arrangements. They do not allege when they acquired the knowledge, nor give a satisfactory reason why it was not sooner obtained. *For aught that appears, they have slept upon their knowledge for several years.*"

We do allege when we acquired the knowledge; why we did not sooner acquire it; and we have not slept upon our knowledge at all, but promptly filed the bill.

Sullivan vs. Portland and Kennebec R. R. Co., 17 Wallace, 78, was a case tried upon bill and answer, and the court find—

"The charges of fraud and conspiracy in the bill are wholly unsupported by the proofs."

And in applying the doctrine of laches it is put upon the ground that

"The complainants were supine and silent for more than seventeen years;"

A delay wholly unaccounted for, during which time the property passed into entirely new hands.

There is no question of want of knowledge in the case, or of any fraud. It is simply a case of seventeen years' delay in asserting a right which could have been asserted at any time, even in an action at law.

Brown vs. the County of Buena Vista, 5 Otto, 157, decides absolutely nothing except that

"A court of equity applies the rule of laches according to its own ideas of right and justice; every case is governed by its own circumstances."

And under the circumstances of that case the suit was not commenced *after discovery* in proper time.

Of course all of these cases assert the rule that courts of equity will not aid a person who has been guilty of laches, but in each case the circumstances must be looked to to find the application of that rule.

No one will pretend that a trustee could assert lapse of time as a defense, where the *cestui que trust* was ignorant, and the duty of the trustee was to inform him, and he had failed to do it.

Coddington vs. The Railroad Co. et al., 103 U. S. 409, was a case where the eight year statute of Florida had run, and there was no allegation in the bill of when the fraud was discovered, and "All the facts now alleged to constitute the fraud were as well known to the complainant at the time of the tranaction as now."

The United States vs. Throckmorton, 98 U. S. 68, is a case which we have already cited from at length. It is a case where more than twenty years elapsed after the final decree before the filing of the bill impeaching it, and the fraud alleged was in issue on the former hearing.

The head notes of that case were prepared by Mr. Justice Miller, and show what was decided. The question of laches was not discussed at all, but the effect of fraud, and what constitutes a fraud in obtaining a decree, is so well presented that we have quoted the whole of it on that subject in this brief.

Burke vs. Smith, 16 Wallace, 390, simply holds that "A court of equity will not set aside a fraudulent transaction at the suit of one who has been quiescent during a period longer than that fixed by the statute of limitations, after he had knowledge of the fraud, or after he

was put upon inquiry, with the means of knowledge accessible to him."

Goddeu vs. Kimmell, 99 U. S. 201, is disposed of by the court in a single paragraph:

"For fourteen years complainants slept upon their rights, and there is not a single allegation in the bill, nor a particle of proof introduced in their behalf, to excuse their manifest laches in not seeking an account until all of the parties in interest have departed this life."

Here again the laches was averred by answer and the proof taken on it, and the conclusion of the court was from the evidence.

"The *cestui que trust* will not be held to have lost his rights by laches, where the evidence shows that the delay was due to the fault and misstatements of the trustees."

Loring vs. Palmer, 118 U. S. 321.

But the learned circuit judge, in treating this part of the case, seems wholly to have overlooked the allegations of the amended bill, which we insist alleges facts of active concealment, which brings it clearly within the most extreme cases, and meets every requirement of the case of Wood vs. Carpenter, and the other cases cited by the learned judge in his opinion.

THE LATEST CASES IN THE SUPREME COURT.

The case of *Kirby vs. The Lake Shore R. R. Company*, 120 United States, 130–139, expressly affirms the cases of *Bailey vs. Glover*, *Traer vs. Clews*, and the other cases in accord with them, and without repeating them here we ask the court's attention to the case as found reported in United States Supreme Court Reports, April, 1887, No. 4, page 572, and in view of the argument of counsel for the defense, we want to emphasize the doctrine of those cases.

"We also think that in courts of equity the decided weight of authority is in favor of the proposition that, where the party injured by the fraud, remains in ignorance of it without any fault or want of diligence on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

"Where relief is sought in equity on the ground of actual fraud, especially if such fraud has been concealed, time for commencing the suit will not run against the plaintiff until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered."

Kilbourn vs. Sunderland, 130 U. S. 505–520. (Opinion by Chief Justice Fuller.)

Bryan vs. Kales, 134 U. S., 126–136. (Opinion by Mr. Justice Harlan.)

During the oral argument very little was said by counsel supporting the demurrer upon the first point above mentioned, as to the vagueness of the allegations of our

bill, except to reiterate the charge that they were vague. And we do not care to repeat the allegations of the bill here. The conspiracy, and the history of its success and the wrong accomplished by it, are of startling distinctness. The bad faith of the trustees; the fraudulent control of the defendant, the corruption of its officers, the efforts to conceal from the court and the stockholders the truth, the procurement of the defendant's property without consideration, are well and distinctly alleged.

The court below, however, in the opinion filed in the case, wholly overlooked the fact that the Pennsylvania Company put its agents into control of the Mansfield Company as directors, without ownership or interest except as the paid agents of the Pennsylvania Company, and then by their vote caused a withdrawal of the defense of the suit instituted by the Pennsylvania Company to get possession of the property.

SINKING FUND.

Very much stress is laid on the fact that the sinking fund was not provided for. There was no sinking fund to be provided for except upon bonds actually earned, and at the end of each year after they were earned. The answer filed in the original suit distinctly denies the service of any notice, or the making of any demand for the sinking fund, which was necessary, if there was any of

it due, to entitle the bondholders or the trustees to declare a default under the mortgage. Our bill distinctly avers that there was no part of the bonds earned, no part of the bonds claimed by the trustees to be due, were due, and hence no part of the sinking fund due. But suppose there was some part of it due ; no interest on the bonds was due, and no declaration by the bondholders that they had a right to make, declaring their principal due. Now, if there was $16,000 due on the sinking fund, and nothing due on interest, and the bondholders, even if $1,600,000 was lawfully outstanding, had not elected, in the manner provided in the mortgage to declare the principal due because of the non-payment of the sinking fund, and the answer denies that, then certainly nothing more than the $16,000 could be decreed against the company, and that we have a right to assume, would have been paid, whereas the amount which they were ordered to pay to prevent a sale, was nearly two millions of dollars.

If we had a defense *pro tanto*, and it was fraudulently defeated our bill is good.

But if the Pennsylvania Company, or Pennsylvania Railroad Company, or Scott & Cass, or any of the bondholders were themselves in default, and that default put the company in a position of insolvency, could they assert the failure to pay this sinking fund contribution as a reason for such a decree as was entered in this case ? The $16,000 a year was due only because $1,600,000 of bonds were outstanding lawfully earned. No one can

pretend that eighty miles of railroad in ten mile sections had been completed ready for traffic. Our bill alleges that no part of it was at that time. The answer alleges the same thing. While it states that 47 miles of the road was in condition for traffic it was not completed in accordance with the contract.

It is a little singular that the only part of the road that was ever even partially completed *forms now a part of the Pennsylvania Company's railroad from Toledo east*, and the iron on all the balance of it has been removed and used for some of the purposes of the Pennsylvania Company. Singular that after the consent order of August 19, 1876, LEWIS and FISK, the directors in the Mackinaw road, changed their votes from making a defense, to withdrawing it. *Very* singular that if the defense was not a valid one, the very unusual method of trying it should be resorted to, of transferring it from the court to the board of directors made up in the interest of the Pennsylvania Company. This case had been in court from January 20, 1876, to March, 1877—plenty of time to have had a trial of the issues presented by the pleadings.

Why did the Pennsylvania Company resort to its paid agents in the board of the defendant company to obtain a withdrawal of the defense, if the defense was invalid or untrue?

The very situation and relation of the parties would have required, in common decency, one might say, that

at least the honest judgment of the court could alone protect them from some charge of bad faith, if the facts were ever discovered which we now say they were cognizant of.

Yet they want the court now to say, without hearing the proofs, that no defense could then have been made, because of the failure to pay the sinking fund, although the answer distinctly denied that anything was due under it.

If that were true, a demurrer to the former answer would have been a much wiser method of getting rid of it than the clandestine and fraudulent one adopted.

We are not willing to charge the counsel conducting that litigation with adopting an unwise and injudicious course, if an easy, open, legal and wise method would have accomplished the same result.

But let us suggest that if the decree is opened, we are not limited to the original answer. If the court, in its discretion, permits additional defenses to be made, that cannot be complained of. We propose to make every defense which is equitable and just to be made, whether contained in the original answer or not; and our bill and amendments, to some extent, show what they are.

The scheme was to pay the contribution to the sinking fund out of the earnings,— that is everywhere shown. Now, the earnings were to come from a completed road,

at least in sections. The Pennsylvania Company, by violating its contract, prevented such earnings.

The sinking fund was a fixed charge, and it was the only fund necessary to be raised out of the earnings to prevent a default.

One of the counsel urges with some earnestness that the question we are trying here is—

"Whether every one has a right to rely upon the decrees of the courts of the United States, in settling rights of parties," etc.

The question is not at all that. It is whether any man who obtains a decree by fraud and trickery, by a betrayal of sacred obligations, by deceitful practices on the defendant and the court, can enjoy the fruits of that decree after the fraud is discovered and while he remains in unchanged possession of such fruits.

He reiterates over and over again the statement that the interest being due, and the sinking fund being due, they declared the principal due, and it thereby became due; while in the sixth clause of the answer that is expressly denied, and everywhere in the bill and answer it is averred that no bonds were due, either as to principal or interest.

The form of these proceedings being regular, the decree and orders being carefully and formally prepared, is lovingly dwelt and lingered upon. Granted. The most subtle frauds assume the most innocent and regu-

lar form. The mask worn by fraud would be useless if it advertised the hideousness that it was intended to conceal.

For instance, it is probably true that the form of the election of these employes of the Pennsylvania Co. as directors of the Mansfield Company was very formal; the issue of the stock, no doubt, was with the greatest observance of the formalities required But does anyone claim here that the Pennsylvania Company in May, 1872, or indeed ever was entitled to one and a half millions of the stock? It was the issue of the stock that was wrong. It was the obtaining the decree, not the form of it that was fraudulent.

Again, no one will pretend that the Pennsylvania Company, because it obtained possession of the $4,460,000 of bonds under the agreement of May, 1872, thereby became the owner of them, or had a right to enforce them against the maker. And yet the fact that it produced $1,600,000 of them, would ordinarily, in a suit, imply that it was such owner. It observed the formality required of producing them. But it concealed from the court and the parties interested the way in which it got such possession and was enabled to produce them.

Much stress is laid on the fact that the complainant lived in Ohio and ought to have known all about these transactions. Well the bill alleges that he did not, and why ought he?

In the cases which counsel for defendant cite, the

parties were resting on their own rights, where they were dealing at arm's length with their adversaries. One of a thousand stockholders in a railroad company whose line and the residence of whose shareholders extend hundreds of miles through two states, who has no power to interfere in the management of the corporation, to whom no reports are made by his directors; who has not the opportunity to attend the annual meetings, the usual source of information, because none are called or held; who, relying upon the honesty and good faith of a sworn board of directors is told by their action certainly, that the company has no defense to a claim for nearly $2,000,000, who has that confirmed by a solemn decree of a court like this, and is in the very nature of things thereby led to believe that there is nothing within his power to do; is lulled into silence and inaction in this most artful way, cannot be held guilty of negligence because he did not for himself, and at his own expense, institute such an examination as would detect the existence of a fraud and conspiracy by which all this was brought about, which could only be based upon suspicion of bad faith and a betrayal of trust on the part of his agents and trustees.

Individual stockholders are not bound to the same rule as one who owns the entire property. He is not bound to examine the records, either of the company or court, to ferret out fraud, and the court will bear in mind this rule:

"The court not only looks to the conduct of the per-

son who stands by, but also considers how far the person in possession of the property has any just claims to the protection of the court."—Lewin on Trusts, page 1070.

De Bussche vs. Alt., 8 Ch. D. 286.

And the general rule:

"A *cestui que trust*, who does not actually know, is not to be affected with knowledge of a breach of trust because he might, by inquiry, have ascertained the fact, *for it is not his duty, but that of the trustee*, to see that the trust fund is in proper state."—*Thompson vs. Finch, 22 Beau, 325.*

Life Association vs. Siddall, 3 DeG. & J. 73.
Lewin on Trusts, 1126.

We say he was not bound by the same rule that would apply to him as if he were the sole owner; that he was not bound to examine records or proceedings or to constitute himself a detective to hunt up the question of whether his sworn trustees were acting in bad faith; that he had the right to rely upon their honesty; that he is not bound by constructive notice as against the perpetrators of the fraud, *and that the court will search in vain for any ground upon which the defendants in possession are entitled to the protection of a court of equity.*

"Will the court go back, he asks, and blot these pages of the record of this court, ten years after they were made?" Yes, if they are a blot on the record.

The sanctity of the records and judgments of courts

implies their purity, and to preserve their purity is the highest duty of a court.

We wish to impress this prominent fact on the court.

We seek only to be permitted to make a defense. We seek it against no one who can assert any right acquired without notice; we seek it only against those charged with circumventing it by fraud and wrong, when it should have been made. The defendants stand upon no ground sacred to a court of equity. No wrong can be done them by an honest enquiry. Great and irreparable wrong has been done these stockholders, if this decree and sale is to be final.

It will be an unfortunate application of an equitable principle to promote inequity and to perpetuate fraud.

DO THE RECORDS IN THE CASE COMPLAINED OF CONSTITUTE NOTICE?

"In equity and admiralty causes, only the process, pleadings, and decree, and such orders and memorandums as may be necessary to show the jurisdiction of the court and regularity of the proceedings, shall be entered upon the final record." R. S. of the U. S., section 750.

The only pleadings in the cause left after withdrawing, by leave of the court, the appearance of the defendant and the answer, was the bill, and the decree was entered on that, first *pro confesso*, and then a final decree.

The only matters of record, therefore, were the bill, process, the motion and order granting the withdrawal, and the decree. The answer was withdrawn and no longer formed a part of the files in the case, and no constructive notice can be claimed from anything appearing in the answer. Legally it was not on file. Whether it was actually left on the files or not, does not appear, and is not material. It formed no part of the record, and had no place in the record. It was effaced from the case. No notice can therefore be claimed from the answer. The position of defendants seems to be this. You complain of our wrongfully withdrawing the answer. We did withdraw it. We eliminated it from the case, but you are nevertheless bound by it as much as if we did not. We withdrew it from a place which entitles it to record, but you are bound as if it was entitled to record.

The answer was withdrawn, the appearance was withdrawn. The withdrawal of the appearance alone made the answer a stray paper ; but the withdrawal of both appearance and answer left the case on default, and no constructive notice can be claimed from it and no actual notice is pretended to be alleged or claimed. The answer, so far as a trial of the case is concerned, was not in issue, and not being in issue, it could form no part of the record ; that it was recorded is immaterial. The recording of it was voluntary, and a voluntary record is not constructive notice. 2 Pomeroy's Eq. Juris, section 651.

AS TO THE ANSWER TO THE BILL.

The answer of the defendant, Henry C. Hedges, while showing conclusively that he too, was lulled to repose and ignorance by the manner in which the transactions complained of, were perpetrated, does not contradict a single allegation of the bill ; it fully supports the facts alleged in the bill, and admitted by the demurrer ; and it considered alone, especially with reference to the question of laches, and without reference to any other pleading in the case, states a case whereon the complainant is shown to be entitled to all the relief claimed by him in the bill.

PARTIES.

While the present bill is mainly to set aside the decree and to permit a defense, two classes or persons are made parties in addition to the parties to the original bill, viz: Those instrumental in the alleged fraud, and those who claim rights under the alleged decree and sale. This is proper practice. Under the allegations of our bill, the original complainants, or the survivor of them, are made parties; the defendant corporation, in behalf of whose stockholders we sue, the Pennsylvania Company, the Pennsylvania Railroad Company, who were alleged to be parties to the original fraud, but who claimed to be the bondholders upon whose bonds the decree was taken, and who claim interest and are by

their agents in possession of the property with notice, which was the subject of the decree. The Northwestern Ohio Railroad Company, in possession of part of the property with notice, and a creature of the Pennsylvania Company and the officers and directors of the Mansfield Company who are charged with the fraud, and who attempt to control the affairs of the defendant company and who refuse to bring the action for the relief asked.

See Hawes on Parties, Sec. 23, Sec. 26 and note 26; Sec. 28 and note 45 *et seq.*

Hill vs. Reifshider, 39 Md. 432.
Pomeroy's Eq. Jur. Sec. 918.

JOHN H. DOYLE,
Solicitor for Complainant.

25 146 U.S. 88

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IN THE

SUPREME COURT OF THE UNITED STATES,

IN EQUITY.

CHARLES FOSTER,
For himself and others,

Appellant,

vs.

THE MANSFIELD, COLDWATER & LAKE MICHIGAN RAILROAD COMPANY; THE NORTHWESTERN OHIO RAILWAY COMPANY; THE PENNSYLVANIA COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; GEORGE W. CASS, REUBEN F. SMITH, J. TWING BROOKS, GEORGE W. LAYNG, FRANK JANES, F. A. GORHAM, HENRY C. HEDGES AND STEPHEN B. STURGES,

Appellees.

BRIEF FOR THE APPELLEES.

J. T. BROOKS.

STEVENSON & FOSTER, PRINT, PITTSBURGH.

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Charles Foster, Appellant,
vs.
Mansfield, Coldwater & Lake Michigan Railroad Company, et als. Appellees.

In the Supreme Court of the United States.

BRIEF IN BEHALF OF PENNSYLVANIA RAILROAD COMPANY, PENNSYLVANIA COMPANY AND OTHER APPELLEES.

At the April term, 1877, of the United States Circuit Court for the Northern District of Ohio, in a suit then pending therein, wherein Thomas A. Scott and George W. Cass, trustees, were plaintiffs and the Mansfield, Coldwater & Lake Michigan Railroad Company was defendant, a decree of foreclosure of a mortgage was entered, in pursuance of which the railroad and franchises of the defendant were sold, sale confirmed and an entirely new company then became, and is still the owner thereof.

Ten years later, in August, 1887, Foster, a stockholder in the old company, files a bill in equity in the same court, in behalf of himself and other stockholders, alleging, upon information and belief, that the original decree of foreclosure had been obtained through fraud, and asking that it be opened, with leave to answer and contest the original bill. Foster's bill contains no allegation of specific facts which constitute fraud. It is a tissue of suspicions, inferences and assumptions presented upon information and belief, ten years after all the facts had become matter of public record, and after most of the parties to whom fraud is imputed were in their graves.

Charles Foster, Appellant,
vs.
Mansfield, Coldwater & Lake Michigan Railroad Company, et al., Appellees.

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An answer to the original foreclosure bill had been filed in behalf of the Mansfield, Coldwater & Lake Michigan Railroad Company in April, 1876: That answer contained defenses which the majority of the directors of the company were ashamed to be held responsible for. The company was then wholly bankrupt and in such an advanced stage of decomposition that nobody but an Assistant Secretary could be found who would swear to the facts stated in the answer, and he only at a time when the answer would have been thrown out of Court had not somebody been found who was willing to verify it. The company was without a dollar to pay counsel fees. In this state of affairs the directors met in November, 1876, and by resolution duly adopted — two only voting "no," one of these being one of the lawyers whose name was signed to the answer — ordered that the appearance of the company, as well as the answer filed on its behalf in the foreclosure suit, be withdrawn and no further defense made. An entry was inscribed in the journal of the circuit that by order of the directors of the company the appearance and answer of the latter are withdrawn and this entry and the answer were made part of the final record of the case. Ten years after these events transpired, Foster wakes up and says the directors were guilty of fraud in withdrawing that answer. He presents no facts which if pleaded and proved would defeat the original foreclosure bill. He does not trace a dollar of gain, unlawful or otherwise, into the hands of those whom he stigmatizes as guilty of conspiracy and fraud. His bill is wholly without foundation, except in this, that the motives of the directors in voting to withdraw that defense were corrupt and fraudulent. On demurrer, the Court below found his claim to be stale, as well as without equity, and dismissed his bill.

A statement in proper order of the facts disclosed in the record will make it apparent that the dismissal order of the Circuit Court was well founded and should not be reversed.

The Mansfield, Coldwater & Lake Michigan Railroad Company (for sake of brevity called the "Coldwater Company")

was formed by consolidation of an Ohio and a Michigan Railroad Company. The final act of ratification by stockholders took place May 10, 1871. (57.)

On that day the directors of the Consolidated Company were in session and transacted business (114) although the agreement of consolidation had not yet been filed with the Secretary of the State of Ohio, and the law of Ohio contemplates that the election of directors of a consolidated railroad company shall take place after the consolidation agreement has been filed. The agreement was so filed June 1, 1871. (57)

The directors having no suspicion of the infirmity of their powers, proceeded to make contracts, commence the construction of their railroad, issue bonds and mortgages, and were the sole representatives of the company, managing all its business, until the annual meeting of stockholders and election of directors held in January, 1873.

July 21, 1871, the Mansfield, Coldwater & Lake Michigan Railroad Company and the Pennsylvania Company entered into an agreement (15) under the terms of which the first named company was to provide right of way and suitably grade its road bed and have the same ready for superstructure by July 21, 1873, and the Pennsylvania Company was to furnish chairs, rails, spikes, and lay and ballast the track and equip the road. For work and material so furnished the Pennsylvania Company was to receive stock of the Coldwater Company, and especially bonds at the rate of $20,000 per mile of track so constructed; bonds and stock to be put in hands of Scott and Cass in trust, to be delivered by the trustees to Pennsylvania Company as fast as the track was completed in ten mile sections.

It is important to observe that in this construction contract it was stipulated that the bonds which Pennsylvania Company were to receive as above, were to contain a sinking fund clause.

October 1, 1871, the Coldwater Company provided for the issue of bonds to the extent of $4,460,000, and a mortgage bearing that date was executed and delivered to Thomas A.

Scott and George W. Cass, trustees, to secure said bonds. The bonds and mortgage each contained a stipulation for a sinking fund to be paid by the Coldwater Company each year, in order that the bonds might be finally redeemed. (26).

May 4, 1872, the Coldwater Company delivered to the trustees, Scott and Cass, the entire issue of bonds, 4,460 in number, of $1,000 each, consenting that all said bonds might be delivered to Pennsylvania Company at once. In consideration whereof the Pennsylvania obligated itself in writing "to take care of and pay all interest which may mature prior to said Mansfield, Coldwater & Lake Michigan Railroad Company being in condition for traffic; and for all interest so paid by the Pennsylvania Company, and not justly and equitably chargeable thereto under said contract of July 20, 1871, said Pennsylvania Company shall be reimbursed out of the earnings of said Mansfield, Coldwater & Lake Michigan Railroad Company, after the same shall be completed in sections under the said contract, and begin to make earnings on the respective sections, as required by the terms of said agreement." (20).

Sixteen hundred of said bonds, amounting to $1,600,000, are all that were ever sold. The interest on said bonds was made payable in April and October each year. It does not appear in what manner interest due on said bonds October 1, 1872, and April 1, 1873, was provided for, but the interest due October 1, 1873, and all interest following that date was never paid. No contribution for sinking fund purposes was ever made. (78, 79).

October 1, 1872, the Coldwater Company executed and delivered to Scott and Cass, trustees, a supplemental mortgage, the object of which is fully stated in resolutions adopted by the directors and made part of the supplemental mortgage, viz.: "To effect the sale and negotiation of said bonds, and to give the purchasers and holders thereof the highest and best security, etc." Among the changes introduced in the second mortgage was one which made the sinking fund accumulative. (39, 42).

January 6th, 1873, the annual meeting of the stockholders

of the Coldwater Company was held (57). Another on the first Monday of January, 1874, and it does not appear that the stockholders ever after that date met in annual or special meeting (107).

Henry C. Hedges was elected secretary of the company, May 10th, 1871, and continued in said office and in the performance of the duties incident thereto until the first Monday of January, 1874. He was then elected a director, and soon thereafter (January 23d, 1874) was elected vice-president, and was one of the last elected directors and the last vice-president of the company (114, 115). His name appears as one of the officers of the Coldwater Company, executing the construction contract of July 21st, 1871, also the supplemental mortgage of October 21st, 1872 (53), also as one of the attorneys signing the answer of the company, wherein it is averred that neither the construction contract nor the supplemental mortgage was ever executed by the company. (62).

October 19th, 1874, payment of interest due on the bonds of the Coldwater Company was demanded at its office in Mansfield, Ohio, and refused on the ground that the company had no funds wherewith to pay the same. (24). No claim was then made that the bonds were invalid, nor that Pennsylvania Company was bound to pay the interest, nor that there had been no corporation and no officers from May 10th, 1871, to January 6th, 1873.

At the February Term, 1875, of the Court of Common Pleas of Fulton County, Ohio, Swan, Rose & Company, contractors, obtained a judgment against the Mansfield, Coldwater & Lake Michigan Railway Company "for the unpaid balance due them as contractors for the building of said road" for the sum of $483,320.17 (the judgment debtor was one of the constituent companies which by consolidation became the Mansfield, Coldwater & Lake Michigan Railroad Company. (65).

January 20th, 1876, Scott and Cass, trustees, filed their foreclosure bill in the United States Circuit Court, Northern District of Ohio (5), averring issue of bonds and mortgage, default in interest and sinking fund, insolvency and no revenue whatever, and large floating debt of the Coldwater Company.

At the February Term, 1876, of the Court of Common Pleas of Fulton County, Ohio, Swan, Rose & Co., the contractors, above named, recovered an additional judgment against the Coldwater Company (consolidated) of $144,294.43 in money, and $230,084 in stock. (65).

April 17, 1876, an answer to the foreclosure bill of Scott and Cass, trustees, was filed in behalf of the Coldwater Company (6). In this answer all the material averments of the bill are denied and the special defense is submitted that the Coldwater Company was not a duly created and organized company, prior to January 6, 1873, at which time occurred the first election of directors following the filing in the office of Secretary of State of Ohio of the agreement of consolidation: That the bonds, mortgage and supplemental mortgage were of no validity, for the reason that there was no Coldwater Company between May 10th, 1871, and January 6th, 1873, and that all acts done by those who assumed to be President and directors during that period were null and void. No specific defense against the default in respect to the sinking fund is offered—but as to default in respect to interest —it is claimed that Pennsylvania Company was bound to pay it, under the contract of May 4th, 1872

This answer, as has before been stated, was, by journal entry, formally withdrawn (76) but it became then and has since continued to be a part of the permanent records of the Circuit Court of the United States for the Northern District of Ohio, and it contains every element of defense in behalf of the Coldwater Company that is presented by Foster's bill, except so far as the motives of the directors who ordered the defense withdrawn are concerned.

The answer and cross-bill of Swan, Rose & Co. (67) presents all the elements of defense as the answer of the company, and, although these intervening petitioners were dismissed, their answer and cross bill, setting up all the facts on which Foster relies, had become part of the permanent records of the Court more than ten years before Foster filed his bill.

November 3, 1876, the directors of the Coldwater Company

met in Toledo; present, the President and eight directors, and a resolution was adopted rescinding a former resolution instructing Messrs. Scribner, Hedges and Shipman to defend against the suit of Scott and Cass, trustees, and directing opposition to that suit to cease. (9. 117). All voted in favor of this resolution except Sturges and Hedges.

January 3, 1877, the journal entry was made pursuant to above resolution, and the appearance and answer of the Coldwater Company withdrawn March 21, 1877, and decree *pro confesso* was entered as to the Coldwater Company. (6).

July 7, 1877, Swan, Rose & Co. were dismissed from the suit and a final decree of foreclosure was entered, the decree being based on the default in respect to unpaid interest and unpaid sinking fund. Sale was made and confirmed in the month following, viz., August, 1877.

The facts disclosed in the exhibits to Foster's bill show that his claim is a chimera. The withdrawal of the defense in the foreclosure suit by the directors of the Coldwater Company is the foundation of his claim. He concedes to these directors neither intelligent judgment nor honesty of purpose. He ignores the bankruptcy of the company. He allows but one construction to be put on the agreement of May 10th, 1872, viz: that Pennsylvania Company should pay interest on all bonds as well those which it had earned as those which it had not earned. He ignores the obligation of his company to pay sinking fund on its bonds, as to which there was no imaginable defense. He insists that the managers of a corporation who have gotten a million and a half dollars from innocent people on the strength of bonds and mortgages which they had put forth as valid securities should swindle those bondholders if they could do so by pleading that they had no capacity to borrow the money or issue the bonds. And because these directors ten years ago in such sense of duty and self respect as was given them, did not act according to his standard of morals, they become the victims of his furious and wicked calumny. His theory is that Pennsylvania Company wished to "destroy so much of the road of the defendant, the Mans-

field, Coldwater & Lake Michigan Railroad Company, as lies west of the Town of Tiffin and to sink and destroy its stock" (8) and to support that theory he drags into his imaginary fraud and conspiracy pool whatever trustees, officers and directors are necessary to make a *prima facie* case: And inasmuch as it is wholly a question of motive with the directors, Foster can only say he believes they were all scoundrels, and on the assertion of his belief that these men were scoundrels he asks that the ancient decree be now set aside.

The Court is respectfully asked to consider the nature of the charges on which Foster assails the character of so many men.

First. The President of the Coldwater Company and eight directors, one of whom was Vice President, were present when the resolution withdrawing the defense was adopted: Of these directors four were variously employed by the Pennsylvania Company. Foster assumes that the employes of a corporation will commit a fraud, provided the officers of the corporation wish them to do so. Therefore he says he believes these four Pennsylvania Company employes committed a fraud in this case. But four directors were not enough to perpetuate the fraud. Gorham the fifth director, who was not an employe of the Pennsylvania Company voted for the resolution; also Mr. Fisk, the sixth director. Nothing is charged against Gorham; but Fisk happened to be a director in another railroad company with Lewis, the President of the Coldwater Company. The latter did not need to vote and did not vote on the resolution. But because they were interested together in another enterprise Foster proceeds to blacken, as far as he can, the character of these two dead directors, by charging, that, for a certain price, they became corrupt instrumentalities of the Pennsylvania Company and aided in carrying out the fraudulent designs of that company. He mentions the particular price they received and the Court can determine the worth or worthlessness of Foster's assertions by what he says in respect to the bribery of these two men: (10) "they were directors of the Coldwater, Marshall & Mackinaw Railway Company, to which company was to be given by Scott and Cass, trustees,

a large portion of the property of said defendant, the Mansfield, Coldwater & Lake Michigan Railroad Company, to induce said Lewis and Fisk as directors of said defendant, the Mansfield, Coldwater & Lake Michigan Railroad Company to favor the withdrawal of said answer and defense as aforesaid." How trustees of a railroad mortgage could give away a large part of their trust property and not be caught in the act is one phase of this subject which has eluded the vigilance of Foster's ingenious counsel, in the elaborate brief he has prepared; but the record in the foreclosure suit, which is a part of Foster's bill shows exactly how Lewis and Fisk were paid.

On the main line of the Coldwater Company, near Monteith, Mich., there were in the spring of 1876 about eight miles of finished track which was not in use, other portions of the line adjacent thereto being unfinished; the officers of the Coldwater, Marshall & Mackinaw Railroad Company, applied to all parties in interest for permission to take up this eight miles of track and re-lay it on another portion of the Mansfield, Coldwater & Lake Michigan Railroad Company line near Coldwater. The directors of the last named company at a meeting held August 18, 1876, by a unanimous vote, gave their consent. (115). The Pennsylvania Railroad Company (not the Pennsylvania Company) as the owner of all the bonds of the Coldwater Company which were involved in the foreclosure suit gave its consent. And so an order of Court was entered permitting the removal and replacement of the iron from one part to another part of the Coldwater Company's railroad and its use by the Coldwater, Marshall & Mackinaw Company for a limited period and upon terms which protected every interested party's interest to the fullest extent imaginable. (63). Other than the above no price is averred or known to have been ever paid to Lewis and Fisk as compensation for Fisk's vote on the resolution of November 3, 1876.

Is it not strange, that if there had been a fraud in these transactions, Hedges, the Vice President, who protested against

the resolution and Gorham, the director who voted for it, would have known of it and taken active measures to protect the company: on the contrary Hedges says in his answer to the Foster bill and in relation to Foster's imputations upon Lewis and Fisk (114) that they "are all of them new to this defendant and until the filing of the said complainant's bill of complaint herein, this defendant never had any knowledge of such fraudulent and unlawful acts, nor had he any suspicion whatever that the answer and defense filed and made by the said defendant, the Mansfield, Coldwater & Lake Michigan Railroad Company in the foreclosure proceedings, in the said complainant's bill of complaint, complained of, was withdrawn as the result of said fraudulent and unlawful acts and alleged conspiracies." It was reserved for Foster to entertain the suspicion ten years after the events had transpired.

Second. The fraud could not be perpetrated without the aid of Scott and Cass, trustees. Scott is a most convenient victim because he was the President of Pennsylvania Company as well as trustee and probably with one exception the chief conspirator. But as there were two trustees instead of one, the other trustee, Mr. Cass must receive, or I should say, his grave must receive its share of Foster's calumny; for it is not asserted that he was connected with Pennsylvania Company; nor is any particular act or reward of fraud attributed to him; without any motive or reward he simply ignored his duty as trustee and aided in the commission of this particular fraud.

Third. To sustain his bill Foster must show that Pennsylvania Company the guilty party in 1876, owned the bonds and now owns the railroad which once belonged to the Coldwater Company. But the record shows that Pennsylvania Railroad Company owned the bonds and that the Northwestern Ohio Railroad Company now owns the railroad. These obstacles he disposes of with another "belief" "that Pennsylvania Company and Pennsylvania Railroad Company were organized and controlled by the same persons and had the same business interests, aims and undertakings." (11). Also another "belief" "that Northwestern Ohio Railway Company is

but a branch of said defendant, the Pennsylvania Company." (11). One being a corporation of Ohio; the other of Pennsylvania.

I pass by the amendment to Foster's bill of complaint (106) merely asking the Court to consider the loose manner in which a great crime is "believed" to have been committed by somebody; the vague assertions in respect to loss of the records of the Coldwater Company and complaints that the stockholders were not called together.

The names of Thomas A. Scott and George W. Cass, who were trustees in the Coldwater mortgages, count for something more than Doe and Roe in this country against a loose charge of forgery, even on demurrer. The record does not show that an employe of Pennsylvania Company was ever an officer of the Coldwater Company: Hence what weight is to be given to the random insinuations about loss of records and no calls for stockholders' meetings? Henry Hedges has been Vice President of the Coldwater Company since January, 1874. Joseph Hedges was the last known Secretary or Assistant Secretary. Let the real officers of this company answer for missing records and non-performance of official duties.

The questions of equity presented by Foster's bill were elaborately discussed in the Circuit Court, and his Honor, Judge Jackson, has seen proper to make his opinion in support of his dismissal order a part of the record of the case. (118–132). The points made by him against Foster are these:

1. In this suit the rights of the Mansfield, Coldwater & Lake Michigan Railroad Company are primarily involved. Foster as a stockholder can be only incidentally benefited by it.

2. Foster's bill admits that the Mansfield, Coldwater & Lake Michigan Railroad Company was a duly and legally created and organized corporation about June 1, 1871; therefore, so much of the answer of that company which was filed in the foreclosure suit, as denied its legal organization and want of power to make the mortgages of October 1, 1871, and October 1, 1872, and to issue the bonds secured thereby, may be dropped from consideration.

3. The true meaning of the contract of May 4, 1872, whereby Pennsylvania Company agreed to pay interest on bonds of the Coldwater Company is, that that company would pay interest on all such or so many of said bonds as might be used, and to which it was not entitled under the contract of July 20, 1871. But whether this be true or not, the defense was known to and set up by the company in its answer in the foreclosure suit—and Foster's ignorance of the defense, no matter how it was caused, does not give him as a stockholder a right of action.

4. That the record in the foreclosure suit shows that Pennsylvania Railroad Company, not the Pennsylvania Company, was owner of the bonds involved in that suit; that as such owner the Pennsylvania Railroad Company was not required by the contract of May 4th, 1872, even if its terms should be construed as Foster desires, to compel Pennsylvania Company to pay interest on the bonds; but could proceed at once to enforce the remedies of the mortgage.

5. The claim of the Coldwater Company in its answer and of Foster in his bill that Pennsylvania Comany had not earned the bonds on which the foreclosure suit was based; hence want of consideration is of no avail, because under the contract of July 20th, 1871, the Coldwater Company was to perform certain obligations and neither in the original answer, nor in Foster's bill is it averred that the Coldwater Company had fully performed its undertakings in that contract; moreover these facts present no defense against the owner of the bonds.

6. The allegations of fraud against the directors of the Coldwater Company are vague and no specific facts are stated which fairly or by necessary implication make or render the action of the Board of Directors in withdrawing said defense corrupt or a breach of duty.

7. Foster's allegations of concealment of the fraudulent acts complained of are wholly insufficient to have arrested the running of the Statutes of Limitation in analogy to which Courts of equity generally act in testing the question of laches: They

are insufficient to justify the long delay which has elapsed since the rendition of the decree in 1877 till the commencement of the present suit in 1887. Therefore under the facts and circumstances of this case as disclosed in the bill, even assuming the existence of the frauds alleged, such laches are shown as should defeat the relief sought.

8. The bill is further defective in not showing any valid defense to the foreclosure proceeding which is sought to be opened. It is not pretended in the original answer, nor in the present bill that the Coldwater Company ever paid interest on the one million,six hundred thousand dollar bonds although it is admitted that iron was laid on 75 miles of railroad, nor that it ever paid the contribution which was due to the sinking fund.

9. As to the averments in Foster's amendment to his original bill (106), wherein it is charged upon information and belief that the supplemental mortgage was mutilated and altered after it had passed into the hands of Scott and Cass, trustees, and the agents of the Pennsylvania Company. That supplemental mortgage was a part of the Scott and Cass original foreclosure bill. If there had been an alteration of it, the attorneys for the Coldwater Company could have seen it and taken advantage of the fact if it existed in the answer they drew in the spring of 1876. But no mention of alteration or forgery occurs therein, and even if the fact as alleged be true it is now too late for Foster to come forward with any such complaint.

The appellees rest their case on the points and authorities stated in Judge Jackson's opinion with this additional suggestion: The record in the foreclosure suit as now presented to this Court explains the motives of the directors of the Coldwater Company, and vindicates their action in withdrawing opposition to the foreclosure bill. For it is made manifest that at that time the Coldwater Company was hopelessly bankrupt. Its stockholders never thought it worth looking after, subsequent to their last meeting in January, 1874. Judgments were entered against it to the amount of over six hundred thousand dollars. Its road was unfinished;